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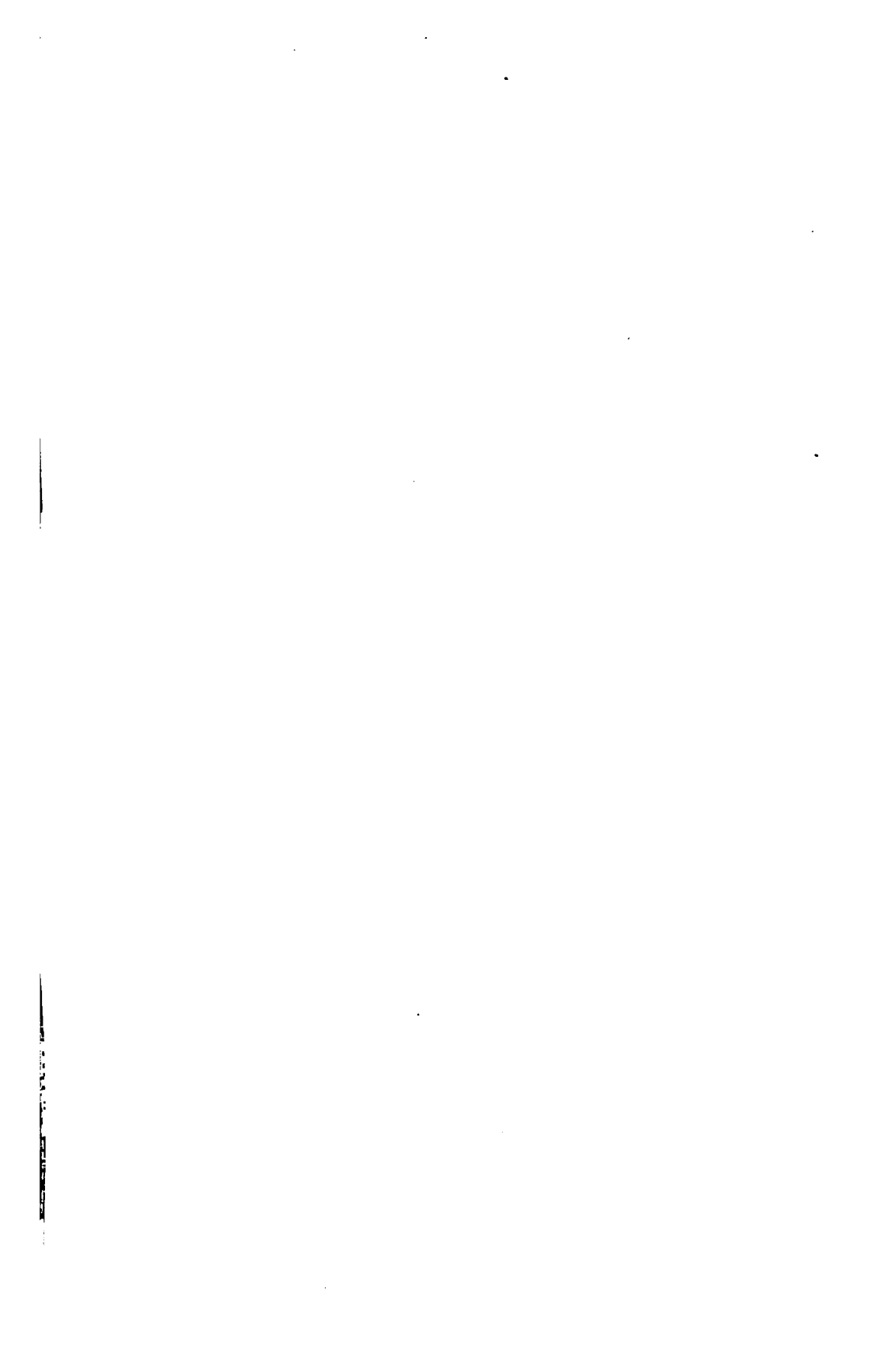
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**REPORTS**  
**OF**  
**CASES DECIDED**  
**IN THE**  
**APPELLATE COURT**  
**OF THE**  
**STATE OF INDIANA**

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-  
BOOKS CITED, STATUTES CITED AND CONSTRUED,  
AND AN INDEX**

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**ASSISTANTS.**

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**VOL. 70**

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**PORT WAYNE PRINTING COMPANY**  
**CONTRACTORS FOR INDIANA STATE PRINTING AND BINDING**  
**PORT WAYNE, INDIANA**  
**1921**

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**OFFICERS**  
**OF THE**  
**APPELLATE COURT**

**ATTORNEY-GENERAL,  
ELE STANSBURY**

**REPORTER,  
WILL H. ADAMS**

**CLERK,  
P. J. LYNCH**

**SHERIFF,  
GEORGE D. ABRAHAM**

**LIBRARIAN,  
CHARLES E. EDWARDS**

**JUDGES**  
**OF THE**  
**APPELLATE COURT**  
**OF THE**  
**STATE OF INDIANA**

**DURING THE PERIOD COMPRISED IN THIS VOLUME**

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**HON. ETHAN A. DAUSMAN¶§**  
**HON. IRA C. BATMAN§**  
**HON. EDWARD W. FELT†**  
**HON. MILTON B. HOTTEL†**  
**HON. JOSEPH G. IBACH†**  
**HON. FREDERICK S. CALDWELL‡**  
**HON. WILLIS C. McMAHAN\***  
**HON. CHARLES F. REMY\***  
**HON. SOLON A. ENLOE\***  
**HON. ALONZO L. NICHOLS\***

¶Chief Judge, November Term, 1918.

†Elected 1910, and re-elected in 1914.

‡Appointed September 1, 1913, and elected in 1914.

\*Elected in 1918 to succeed the judges elected in 1914.

§Elected in 1916, and re-elected in 1920.

CASES DECIDED  
IN THE  
**APPELLATE COURT**  
OF THE  
STATE OF INDIANA,  
AT INDIANAPOLIS, NOVEMBER TERM, 1918, AND MAY TERM,  
1919, IN THE ONE HUNDRED SECOND AND ONE  
HUNDRED THIRD YEARS OF THE STATE.

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STATE OF INDIANA, EX REL. FRIEDMAN *v.* FREIBERG ET AL.

[No. 9,861. Filed April 16, 1919.]

1. **EVIDENCE.—Judicial Notice.—Authentication of Transcript.—Designation of Clerk.**—A transcript of a record on an appeal from the circuit court, signed by the clerk of the superior court, is sufficient, since the appellate court judicially knows that the clerk of the circuit court is *ex officio* clerk of the superior court. p. 3.
2. **INTOXICATING LIQUORS.—Revocation of Liquor License.—Liability for Attorney's Fees.—Bond.—Statute.**—In a proceeding to revoke a liquor license, a bond filed with the complaint, and conditioned that plaintiff shall pay all costs and charges if the license is not revoked, as required by §8323y Burns 1914, Acts 1911 p. 244, does not require the payment of attorney's fees incurred in defending the action. pp. 3, 4.
3. **COSTS.—Right to Recover.**—Costs are never allowed a party in the absence of a statute, and a party claiming costs must show that the costs or charges which he claims are within the statute. p. 4.
4. **STATUTES.—Construction.—Common-Law Meaning.**—Where words of a definite significance under the common law are used in a statute, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning. p. 4.

From Marion Circuit Court (25,828); *Louis B. Ewbank*, Judge.

Action by the State of Indiana, on the relation of

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State, ex rel. v. Freiberg—70 Ind. App. 1.

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Hyman Friedman, against Ben Freiberg and another. From a judgment for defendants, the relator appeals. *Affirmed.*

*Richard M. Fairbanks, John Ogden and Merrill Moores*, for appellant.

*Ben Berg*, for appellee.

MCMAHAN, J.—This is an action by the State of Indiana, on the relation of Hyman Friedman, to recover against Ben Freiberg and The National Surety Company of New York City, New York, upon their bond, the sum of \$100 charges for attorney's fees in defending a cause of action instituted by Ben Freiberg, one of the appellees, to suspend or revoke a liquor license held by the relator, Hyman Friedman.

The complaint alleges that the appellee Ben Freiberg filed his complaint for the revocation of a retail liquor license held by the relator; that he gave a bond, as required by §8323y Burns 1914, Acts 1911 p. 244, §20, with the appellee surety company as surety, and conditioned that the appellees "shall pay all costs and charges incurred by the said Hyman Friedman if such license be not suspended or revoked"; that said cause was tried, and a judgment rendered in favor of the relator, and that his license was not suspended or revoked; that relator was compelled to, and did, incur a charge of \$100 for attorney's fees in defending said action. The appellees filed separate demurrers to the complaint, which were sustained. Relator excepted and, refusing to plead further, judgment was rendered against him that he take nothing.

Appellees have called our attention to the fact that the transcript filed in this court is signed by Theodore

Stein, Jr., as “Clerk of the Superior Court,  
1. Marion County, Ind.,” instead of clerk of the circuit court, and insist that this is not sufficient to bring any question before this court.

This court judicially knows that the clerk of the Marion Circuit Court is *ex officio* clerk of the Superior Court of Marion county. The certificate is signed by the person who was in fact clerk of the Marion Circuit Court, and is witnessed by the seal of the circuit court. This is sufficient.

The only question involved in this appeal is, Do the words “costs and charges incurred” in the bond include attorney’s fees incurred in defending the action for the revocation of the liquor license held by the relator?

Section 8323y, *supra*, authorizes any voter of the city or township for which a license to sell intoxicating liquor has been granted to file his complaint

2. for the revocation or suspension of such license, and provides that upon the filing of such complaint and “a bond in the sum of two hundred dollars, with sureties to be approved by the auditor, payable to the holder of such license, to the effect that such voter will pay all cost and charges incurred by the holder of the license if the license be not suspended or revoked, the board of commissioners shall issue notice to the holder of such license. \* \* \* If such licensee appears and contests such application to revoke his license, he shall, at the time of such appearance, file a bond payable to the remonstrators in the same sum and upon the same conditions as above herein required of the complainant in such cases.”

Costs are never given or allowed a party in the

- absence of a statute, and a party claiming
3. costs must show that the costs or charges which he claims are within the statute.

It has been the policy of the courts from the earliest times to allow only such costs and charges as are properly taxable as costs.

The phrase "costs and charges" at common law had a well-known, fixed and definite meaning when used in connection with courts and legal pro-

2. cedure. The technical use of these words had become fixed and recognized by the courts of England as early as the case of *Fox v. Smith* (1765), 2 Wils. 267. The action in that case was on a bond given to perform the award to be made by arbitrators. The arbitrators made an award requiring the payment of a certain sum and all such "costs, charges and expenses" as the plaintiff had been put to in the cause. The court, speaking through the Lord Chief Justice, said: "By costs, charges and expenses, are meant such costs, etc., as courts take notice of by their officer; it might be said that all costs between the attorney and client are meant thereby, but we will take the words of the arbitrators to mean the same as if they had been the words of the court."

Where words of a definite significance under the common law are used in a statute, and there is nothing to show that they are used in a different sense,

4. they are deemed to be employed in their known and defined common-law meaning. *Truelove v. Truelove* (1909), 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220, 139 Am. St. 404.

We know of no authority in this state authorizing a recovery of attorney's fees as costs or charges. In

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Chicago, etc., R. Co. v. Wesolowski, Admx.—70 Ind. App. 5.

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fact, it has been held that attorney's fees could

2. not be allowed in partition when the expression was "costs and expenses." *Hutts v. Martin* (1893), 134 Ind. 587, 33 N. E. 676. The legislature in the enactment of the statute requiring the giving of a bond doubtless had in mind the construction which the courts have given the phrase.

The construction which the courts have given such phrases as "costs and charges" included only such charges as the court had jurisdiction to adjudicate and to enforce by the necessary order for their payment. Had it been the intention of the legislature to include attorney fees, they would doubtless have said so, as they did when it was provided that attorney fees should be included as a part of the expense in partition suits. §1265 Burns 1914, Acts 1893 p. 315.

The court committed no error in sustaining the demurrer to the complaint.

Judgment affirmed.

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CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY  
COMPANY v. WESOLOWSKI, ADMINISTRATRIX.

[No. 9,781. Filed April 16, 1919.]

1. *APPEAL—Review.—Weighing Conflicting Evidence.*—Although the court on appeal will not weigh conflicting evidence, it will not sustain a verdict that is contrary to all the evidence or to some essential element of the case. p. 8.
2. *APPEAL—Review.—Evidence.—Scope of Review.*—In an action for wrongful death, where plaintiff's decedent was killed in a collision between an automobile in which he was riding and defendant's electric interurban car, a substantial contradiction in the evidence as to the speed at which the car was traveling presented such a conflict in the evidence as to prevent the court on appeal from reviewing it. p. 8.

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Chicago, etc., R. Co. v. Wesolowski, Admx.—70 Ind. App. 5.

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3. **APPEAL.—Sufficiency of Evidence.—Scope of Review.—Presumptions.**—Every reasonable presumption, inference and intendment will be indulged in support of the general verdict, and in determining whether the evidence sustains it the court on appeal will consider only the evidence more favorable to appellee. p. 9.
4. **STREET RAILROADS.—Crossing Accidents.—Duty to Look and Listen.**—The duty to look and listen is not applied with strictness to those passing over car tracks laid in the streets of cities. p. 9.
5. **APPEAL.—Review.—Instructions.—Invited Error.—Error, if any,** in instructions is not available to appellant, where the erroneous instructions were invited by appellant's evidence, together with its request for instructions, tendered by it, which pertained to the same subject as those complained of. p. 10.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Marion Wesolowski, administratrix of the estate of Frank Dolniak, deceased, against the Chicago, Lake Shore and South Bend Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*F. J. Lewis Meyer* and *Charles E. Cox*, for appellant.

*Anderson, Parker, Crabill & Crumpacker* and *George W. Kurtz*, for appellee.

**NICHOLS, J.**—Action by appellee against the appellant for damages because of the death of Frank Dolniak, caused, as alleged, by the negligence of the appellant.

It is averred in the complaint, in substance, that the appellant is an electric interurban railway company, operating its cars between Chicago, Illinois, and South Bend, Indiana; that in said city of South Bend its tracks occupy the center of Orange street, running east and west, and across Olive street, which runs north and south; that about 5:15 p. m. on June



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Chicago, etc., R. Co. v. Wesolowski, Admx.—70 Ind. App. 5.

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11, 1914, appellee's intestate was going north on Olive street, in an automobile owned and operated by one Frank R. Wesolowski, as his guest; that said automobile was under the control and management of Wesolowski, who was a competent and skilful driver; that they approached Orange street from the south, driving at a slow rate of speed; that with due care they looked and listened for approaching cars; that they neither saw nor heard any car approaching; that they listened for any signals that might be given, but heard none; that on the east side of Olive street, and south side of Orange street, there are frame buildings that obstruct the view of approaching cars from the east; that at said time there was a brisk wind blowing from the west; that they continued to look and listen, but, not seeing or hearing any car approaching, they started across the tracks approaching from the south; that just as said automobile was on the tracks the appellant negligently ran a fast limited passenger car from the east at a dangerous and reckless rate of speed of forty miles per hour, without sounding any whistle or gong, or giving any signal, against the same, with great force and violence, thereby killing appellee's intestate; that appellant negligently failed to sound any gong or whistle, or to give any signal whatever; that by reason of said obstruction, and by reason of the high wind, and by reason of the car being operated by electricity, and by reason of the rapid and dangerous rate of speed at which the car was run, the car did not make sufficient noise in advance thereof that could be heard for any distance away from it; that owing to said negligent, dangerous and reckless high rate of speed at which the car was running, the driver of the automobile with whom appellee's intestate was

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Chicago, etc., R. Co. v. Wesolowski, Admx.—70 Ind. App. 5.

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riding was unable to get his automobile off of appellant's track and out of the reach of said car. The complaint further alleges the appointment of the administratrix, and prays for \$10,000 in damages.

Appellant answered the complaint by a general denial. There was a trial by jury, and verdict and judgment in favor of the appellee. The appellant filed its motion for a new trial, which was overruled, to which ruling appellant excepted, and now prosecutes this appeal.

The only error assigned is that the court erred in overruling the appellant's motion for a new trial. Under this head, appellant complains that the evidence was not sufficient to sustain the verdict, and that the court erred in giving and refusing certain instructions, hereinafter considered.

Appellant concedes that it is the rule of law that this court will not weigh conflicting evidence, but argues that a verdict that is contrary to all

1. the evidence, or to some essential element of the case, cannot be sustained. We fully agree with appellant's contention in this regard, but
2. we do not find that the facts proved are in har-

mony with the proposition which it presents as an elementary principle of law. There was substantial contradiction in the evidence as to the speed at which the appellant's car was traveling, as it approached the place of the accident, some witnesses saying that it was going ten to twelve miles per hour, some twelve to fifteen miles, one thirty-five to thirty-eight miles, while one keeps herself in harmony with all of this diverse testimony, without giving offense to any of it, by saying that it was going "awful fast." This was across a street, without stopping, over which

hung a notice, in plain view of the public, including appellee's decedent, saying "All cars stop here." The jury may reasonably have inferred that appellant was running its car at a negligent rate of speed, and that the occupants of the automobile were, by this notice, lulled into the belief that they were safe, as any car that might approach would stop before crossing the street; and by the general verdict, the jury has found that this evidence was sufficient to support the charge of negligence in the complaint, and to refute any imputation of contributory negligence on the part of the appellee's decedent. In view of the rule of law that every reasonable presumption, inference and

intendment will be indulged in support of

3. the general verdict, and that in determining whether the evidence sustains it the appellate court will consider only the evidence more
4. favorable to the appellee, we must sustain the jury' in its finding as to the elements of contributory negligence and negligence. *Sovereign Camp, etc. v. Porch* (1915), 184 Ind. 92, 110 N. E. 659; *Vandalia Coal Co. v. Coakley* (1916), 184 Ind. 661, 111 N. E. 426; *Aultman, etc., Mach. Co. v. Shell* (1916), 61 Ind. App. 19, 111 N. E. 445; *Indianapolis Traction, etc., Co. v. Klentschy* (1907), 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869. That the "look and listen" law is not applied, with strictness, to those passing over car tracks laid in the streets of cities has been repeatedly decided in this state. *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. See, also, *Indianapolis St. R. Co. v. Bolin* (1906), 39 Ind. App. 169, 78 N. E. 210, a case bearing on points discussed above.

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Chicago, etc., R. Co. v. Wesolowski, Admx.—70 Ind. App. 5.

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There was no issue of "last clear chance" properly in the case, there being no general averment of negligence in the complaint, and facts present-

5. ing such an issue not having been specially pleaded; this fact, together with the conclusion reached from the evidential facts hereinbefore discussed, makes it unnecessary to consider any questions in the case growing out of this doctrine, but we may note that any facts that might suggest the pertinency of the doctrine were developed by the appellant's direct examination of its own witness, the motorman in charge of the car. Instructions Nos. 5, 6 and 7, given by the court, pertain to this doctrine, but, even if erroneous, they were invited by appellant's evidence aforesaid, together with appellant's request for instructions Nos. 21 and 30, tendered by it, which pertained to the same subject, and therefore such error, if any, is not available to the appellant. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Daywitt v. Daywitt* (1917), 63 Ind. App. 444, 114 N. E. 694. These instructions were given in the case of *Indiana Union Traction Co. v. Kraemer* (1913), 55 Ind. App. 190, 102 N. E. 141, where they were approved by this court as a correct exposition of the law of last clear chance.

Instruction No. 13 is on the measure of damages, and is a correct statement of the law as decided in *Thomas Madden, Son & Co. v. Wilcox* (1910), 174 Ind. 657, 91 N. E. 933, and *Vandalia Coal Co. v. Yemm* (1911), 175 Ind. 524, 92 N. E. 49, 94 N. E. 881.

We find no available error. The judgment is affirmed.

## GEORGIA CASUALTY COMPANY v. SCHREPFERMAN.

[No. 9,806. Filed April 16, 1919.]

1. **APPEAL.**—*Review.*—*Harmless Error.*—*Striking Out Answer.*—In an employer's action on an employer's liability policy for the amount of a judgment recovered by an injured employe, an answer setting up collusion between the employer and the injured employe and alleging that the judgment against the employer was obtained without trial and without evidence being presented in pursuance of a conspiracy, was not a counterclaim, since it stated no cause of action in favor of defendant, and, being an answer, error, if any, in striking it out was harmless, where all evidence offered by defendant under its allegations was admitted over plaintiff's objection, and its alleged facts were traversed by special findings. p. 19.
2. **INSURANCE.**—*Employers' Liability Insurance.*—*Policy.*—*Construction.*—*Immediate Notice of Injury.*—Where an employe was injured on October 17, 1913, and the employer gave notice of the accident to the company carrying his employer's liability insurance on October 20, and again on November 28, and, having received no acknowledgment thereof, sent another notice on December 29 on a blank furnished by the insurer, the notice to the insurer was sent within such time as to constitute compliance with a provision of the policy requiring immediate written notice of the occurrence of an accident. p. 20.
3. **INSURANCE.**—*Employers' Liability Insurance.*—*Insured's Action on Policy.*—*Defenses.*—*Fraud or Collusion.*—In an action on an employer's liability policy for the amount of a judgment recovered by an injured employe, where the insurer, with full knowledge of the accident, injury and pendency of the suit therefor and of the proceedings in court when the judgment was rendered against the employer, failed and refused to participate in the defense, as provided by the terms of the policy, it cannot challenge the judgment obtained by the employe for fraud, collusion, or for any other reason. p. 22.

From Putnam Circuit Court; *James P. Hughes*, Judge.

Action by Nick Schrepferman against the Georgia Casualty Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Hutchinson & Burns* and *Harp & Murphy*, for appellant.

*McGregor, Knight & Miller* and *Edward H. Knight*, for appellee.

NICHOLS, J.—The appellant issued to the appellee a policy of indemnity insurance, for a valid consideration, by which policy it insured and indemnified appellee against loss resulting from claims against him for damages on account of bodily injuries accidentally suffered by any employe of appellee at his mine, not exceeding \$5,000, and costs assessed against appellee and expenses. One Cornelius Schrepferman, son of appellee, and who was an employe of appellee, while so employed, was injured, for which injury he prosecuted an action against appellee, and recovered a judgment in the sum of \$5,000 and costs, which amount appellee was compelled to pay, together with appellee's attorney's fees. Appellant refused to reimburse appellee, on demand, for the amount so paid out, and appellee thereupon commenced this action.

Errors relied upon for reversal, which are not waived are: (3) Error in sustaining appellee's motion to strike out the third paragraph of answer. Nos. 4, 5 and 6 challenge the court's conclusions of law. Nos. 7 and 8 are predicated on error of the court in overruling the motion for a new trial, and in sustaining appellee's motion for judgment on the findings and conclusions.

The complaint is quite long, covering, with its exhibits, twenty-one pages of appellant's brief. It is in two paragraphs, the second of which is in substance as follows: The defendant is an indemnity insurance company, organized in the State of Georgia, and doing business in the State of Indiana, such insur-

ance commonly being known as "Employers' Liability Insurance." Plaintiff is, and was at the time hereinafter mentioned, engaged in mining coal, employing a large number of men, including Cornelius Schrepferman. Defendant for a consideration of \$100 issued its certain policy to plaintiff indemnifying plaintiff for one year from June 12, 1913, against loss arising from claims upon plaintiff for damages on account of bodily injuries accidentally suffered or alleged to have been suffered by any employe of plaintiff by reason of the operation of his mine, and thereby agreeing to make good unto plaintiff any loss or damage, not exceeding \$5,000, and further agreeing to defend any suit in the name of, and in the behalf of the plaintiff, and to pay all expenses in defending such suit, and court costs, whether the verdict be for or against the plaintiff, and regardless of the limit of liability expressed in the policy. On October 17, 1913, said Cornelius Schrepferman, while employed by plaintiff as an engineer, and while engaged in the duties of his employment, was injured, and thereafter, to wit, on May 4, 1914, commenced suit in the Clay Circuit Court, against plaintiff to recover damages for such injury, such suit being cause No. 8162, entitled Cornelius Schrepferman v. Nicholas Schrepferman. Summons was duly issued in said cause, and served on this plaintiff. On October 29, 1914, said Cornelius Schrepferman recovered a judgment on trial of the issue in said action in said court against this plaintiff for \$5,000, together with costs, taxed at \$30.65. Defendant had full notice and knowledge of the filing of said action, but failed and refused to defend such suit, and notified plaintiff by telegraph, several months prior to the trial, that it would not defend the suit,

although requested so to do in writing by plaintiff. Plaintiff was compelled to employ counsel to defend such suit, whose services were reasonably worth \$300, which amount plaintiff was compelled to pay. On December 2, 1914, plaintiff paid the clerk of Clay Circuit Court \$5,030.65, in full satisfaction of said judgment and costs. The loss thereby sustained by plaintiff was one against which plaintiff was insured and indemnified by said policy. Plaintiff has duly performed all the conditions of the policy. Within three days after said accident and injury to said Cornelius Schrepferman, as aforesaid, plaintiff sent by mail, properly addressed and postage paid, a written notice of said accident and injury, to said defendant, at its home office in Macon, Georgia, and within forty-two days after said accident, plaintiff again sent by mail, as aforesaid, a written notice of such accident and injury to its said home office. Plaintiff received no answer to either of said written notices. On December 15, 1913, plaintiff telephoned to defendant's local and duly authorized agent, at Indianapolis, Indiana, inquiring as to why such notices had not been duly acknowledged, and why defendant had not made some investigation. Thereafter said defendant by its said agent notified plaintiff by mail, December 27, 1913, that it had no record in its office of ever having received a notice of accident from plaintiff, and therewith inclosed a blank notice of accident and requested plaintiff to fill out and return the same, by mail, giving all facts connected with the accident, stating that defendant would then take the matter up, and investigate without delay, and requesting plaintiff not to delay sending notice by early mail. On December 29, 1913, plaintiff returned said notice, filled out, and



stating all facts connected with said accident of which plaintiff had knowledge, and such notice was received by defendant in due course of mail. On May 6, 1914, plaintiff forwarded to defendant, at its home office, in Macon, Georgia, by registered mail, properly addressed and postage prepaid, a certified copy of the summons served on him in said suit, which was received by defendant, May 7, 1914. On December 3, 1914, plaintiff demanded of defendant \$5,330.65, which was refused. Judgment for \$5,330.65 is demanded. The first paragraph of complaint is similar to the second, but not so specific in its details.

The policy is marked "Exhibit A," and made a part of the complaint. Condition B of the policy is as follows:

"Condition B. When any accident occurs the assured shall give immediate written notice thereof to the company at its home office in Macon, Georgia, or to its duly authorized agent. If any claim is made on account of such accident the assured shall give like notice thereof. If any suit is brought to enforce such a claim the assured shall immediately forward to the company at its home office in Macon, Georgia, every summons or other process as soon as the same is served on him, and the company shall defend such suit (whether groundless or not) in the name and on behalf of the assured. All expenses (legal and otherwise) incurred by the company in defending such suit and all court costs assessed against the assured shall be paid by the company (whether groundless or not) in the name and on behalf of the assured. All expenses

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Georgia Casualty Co. v. Schrepferman—70 Ind. App. 11.

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(legal and otherwise) incurred by the assured in defending such suit and all court costs assessed against the assured shall be paid by the company (whether the verdict is for or against the assured) regardless of the limits of liability expressed in Condition N. The assured shall always give to the company all co-operation and assistance possible. The company shall have the right to settle any claim or suit at its own cost at any time."

To this complaint, after demurrer was overruled, appellant filed answer in three paragraphs, the first being a general denial, the second pleading breach of warranty contained in the schedule, and the third being in substance as follows: Defendant says that plaintiff ought not to recover on either paragraph of complaint because the policy provides in express terms that the defendant was to reimburse only for a loss actually sustained and paid in satisfaction of a judgment after a trial and legal determination of the issue in the cause on its merits; that the judgment which forms the basis of the action in both paragraphs of complaint is not a *bona fide* judgment after a trial of the issues on the merits thereof, but on the contrary the said judgment was entered by the consent of the plaintiff and by a collusion and conspiracy between the plaintiff herein, and the plaintiff in the action of Cornelius Schrepferman v. Nicholas Schrepferman, referred to and identified in the plaintiff's complaint herein, and was entered without any trial of the issues therein, and without any evidence whatever being presented or heard by the court in said cause; and the judgment as ordered aforesaid was not a proper judgment in said action; that the min-

utes entered by the judge in his docket in said cause, from which the clerk of the court made the entry in the order book, which was signed by the court, was dictated by the attorney for the plaintiff herein in pursuance of said conspiracy and collusion; that any sum which was paid to said Cornelius Schrepferman was a voluntary payment, without any legal hearing or determination of the facts, by any court whatsoever, and this defendant is not responsible, and cannot be made to respond in damages therefor, for the reasons aforesaid.

This paragraph of answer was stricken out, on the motion of the plaintiff, for the reason that it was an argumentative denial, and that all proof admissible thereunder could be given under the first paragraph of answer. To this ruling the appellant excepted. The appellant filed its reply in general denial. There was a trial, and special finding of facts, on which, with other facts, the court found: That the appellant issued to the appellee the policy, "Exhibit A" of the complaint covering the time involved in this suit; that Cornelius Schrepferman, on October 17, 1913, while in the employ of appellee, and while in the line of his duties, was injured, which injury resulted in the amputation of his right leg above the knee; that on October 20, 1913, and on November 28, 1913, appellee gave written notice of said accident to appellant, at its home office, in Macon, Georgia, and that the same was in reasonable time; that on December 27, 1913, appellant delivered to appellee a blank notice of accident, with a request to fill it out, and that appellee did, on December 29, 1913, fill it out and deliver it to appellant, stating all the facts which he had knowledge of; that on May 4, 1914, said Cornelius

commenced suit against appellee, and on May 6, appellee sent a certified copy of the summons served on him to appellant, at its home office, aforesaid; and that it was received by appellant on May 7, 1913; that on June 15, 1914, appellee inquired, by telegram, of appellant whether it intended to defend in said suit, and that on June 16, 1913, appellant informed appellee by telegram, from its home office, that it would not, and thereupon appellee employed attorneys to advise him in the preparation of his defense, and to defend him in said suit; that on October 29, 1914, said cause, being at issue, was submitted to the court for trial, and said Cornelius Schrepferman recovered judgment, after trial of the issues in said action, against plaintiff, for \$5,000 and costs, taxed at \$30.65, which was duly entered of record, and was unappealed from, and thereafter remained in full force and binding effect; that appellant was, on May 7, 1914, notified in writing at its home office in Macon, Georgia, of the commencement of said suit, by said Cornelius Schrepferman, against appellee, and at all times thereafter appellant had knowledge of the pendency of said action, but failed and refused to defend the same; that on December 2, 1914, appellee paid to the clerk of Clay Circuit Court \$5,030.65 in full of said judgment and costs, and \$300 attorney fees to his said attorneys, which amount was a reasonable attorney fee. That on December 3, 1914, appellee made demand on appellant for reimbursement, in the sum of \$5,330.65; that the material facts set out and charged in the complaint were established by a preponderance of the evidence; and that the judgment recovered by Cornelius Schrepferman v. Nicholas Schrepferman, appellee, was recovered in good faith, and without fraud, collusion, or conspiracy.

On the findings of the court, conclusions of law Nos. 1, 2 and 3 were stated as follows: (1) That the judgment rendered in said cause of action, between Cornelius Schrepferman and Nicholas Schrepferman, is binding and conclusive upon the defendant, Georgia Casualty Company, in this action, so far as concerns the facts of the rendition of the judgment, its amount, and the cause of action on which it was rendered. (2) That the defendant, Georgia Casualty Company, is responsible over to the plaintiff, Nick Schrepferman, to the amount of the judgment and costs in said action of Cornelius Schrepferman v. Nicholas Schrepferman, plaintiff herein, together with costs and expenses reasonably incurred by the plaintiff herein in the defense of said action. (3) That the plaintiff herein, Nick Schrepferman, is entitled to recover from the defendant, Georgia Casualty Company, in this action, the sum of five thousand three hundred thirty and 65-100 dollars (\$5,330.65). Based on the findings of the court there was no error of law in these conclusions.

After motion for a new trial, which was overruled, judgment was rendered in favor of appellee, from which this appeal is prosecuted.

Appellant contends that the third paragraph of answer was in the nature of a counterclaim. If so, it constituted an affirmative, direct attack upon

1. the judgment, and it was error to strike it out; but this contention cannot be sustained. It does not undertake to state a cause of action in favor of appellant, but only to defeat a recovery by the plaintiff. *Stoner v. Swift* (1905), 164 Ind. 652, 74 N. E. 248. Being but an answer, error, if any, in striking it out was harmless, for the reason that all

evidence offered by appellant in harmony with its allegations was admitted, over the objection of the appellee, and its alleged facts were traversed by the special findings. *Barkley v. Barkley* (1914), 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B 678; *Western Union Tel. Co. v. Meek* (1874), 49 Ind. 53.

Under the seventh and eighth assignments of error, the appellant discusses the validity of the notice of the accident served upon the appellant by the

2. appellee, and the validity and good faith of the judgment rendered in favor of Cornelius Schrepferman against the appellee. The trial court, in its findings of fact, expressly found in favor of the appellee on both of these questions. As we view the evidence, it fully justifies the findings. The conduct of the appellant with reference to each of these matters is not such as to commend it to the court, and justifies the appellee in denouncing the appeal as vexatious. The injury to appellee's son, which occurred October 17, 1913, was so serious as to necessitate the amputation of his right leg above the knee, on October 23, 1913. Notwithstanding the anxiety necessarily incident to these days, on October 20 appellee notified the appellant of the injury, and, receiving no answer, he again notified appellant on November 28. Appellant denied receiving each of these notices, but afterward, on the order of the court, produced the notice of November 28 in court. This fact creates an impression upon the court, to say the least, that appellant was careless with its files. On December 27, 1913, appellant sent to appellee a blank form of notice to be filled out, which was filled and returned December 29, 1913. We do not need to cite authorities to sustain our opinion that the notice was within a reason-

able time. As far as appears by the record, appellant gave no further attention to the matter, and on May 4, 1914, suit was commenced against appellee. The summons was served on appellee, and a copy of it was sent to appellant, but it gave no further attention to it until June 15, 1914, in answer to telegraphic inquiry as to whether it would defend the suit, it answered that it would not "on account of delayed notice." The case then stood upon the docket until October 29, 1914, during which time appellant failed and refused to appear and defend the suit, and this in the face of the provision in its policy that the "company shall defend such suit (whether groundless or not) in the name and on behalf of the assured." We find no provision in the policy requiring the appellee to defend any suit. While appellant did not defend the suit as it was required to do by the terms of its policy, evidently, it was standing by watching results, and seeking an avenue through which it could escape from the legitimate liability. The case was set for trial on October 29, 1914. Before that time, appellant by its agent or attorney employed a stenographer in the city of Terre Haute to go to the Clay Circuit Court on the day set for the trial of the case, and to make notes of the proceedings of the court. It is to be said to her credit that she did not know anything about the case or the purpose for which her notes were being taken. She appeared as arranged, and the appellant appeared by its agent or attorney, but apparently he was not acquainted with her—at any rate, he did not speak to her or notice her. He was present, but not there! Present for the purpose of spying upon the court, and challenging its proceedings for collusion and fraud, thereby haply saving appellant from the

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payment of a legitimate liability, but not there for the purpose of defending the suit, as, by the

3. terms of its policy, it was bound to do. With full knowledge of the accident and injury, and of the pendency of the suit, and of the occurrences in court on the day the judgment was rendered, but failing and refusing to participate in the defense, appellant is not now in position to challenge the judgment for fraud, or collusion, or for any other reason. *City of Bloomington v. Chicago, etc., R. Co.* (1913), 52 Ind. App. 510, 98 N. E. 188; *South Bend Pulley Co. v. Fidelity, etc., Co.* (1904), 32 Ind. App. 255, 67 N. E. 269, 68 N. E. 688. The last case cited is very much in point, holding that the defendant could not claim to have been prejudiced by the failure of the plaintiff to defend an action, the defendant having had an opportunity itself to defend the action, but failing and refusing so to do, and there being no showing that the judgment rendered was in any way one not proper to be rendered in the absence of any defense.

The appeal is without merit, and the judgment is affirmed, with ten per cent. penalty, and costs.

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WEBB ET AL. v. CITIZENS NATIONAL BANK OF THE CITY  
OF JEFFERSONVILLE, ET AL.

[No. 9,271. Filed April 19, 1917. Rehearing denied June 27, 1917.  
Petition to transfer withdrawn April 16, 1917.]

1. PLEADING.—*Demurrer.—Inferences.*—Upon demurrer all reasonable inferences deducible from the facts alleged may be considered in aid of the pleadings. p. 28.
2. INJUNCTION.—*Complaint.—Sufficiency.*—In an action to recover bonds deposited as collateral to secure the payment of a promissory note, allegations in the complaint, *held* sufficient upon demur-



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rer to show that plaintiff's agent had authority, upon being informed by payee bank as to the amount due on the note, to make a tender and demand the return of the bonds, and that the amount tendered was the full amount due. p. 29.

3. *TENDER.—Sufficiency.—Refusal.—Payment into Court.—Necessity.*—In an action to enjoin payee bank from enforcing any lien against bonds deposited as collateral to secure the payment of a promissory note, the tender of the amount due on the note must be kept good by paying such amount into court. p. 30.

From Floyd Circuit Court; *John M. Paris*, Judge.

Action by John G. Webb against the Citizens National Bank of the City of Jeffersonville and George H. Holzbog, in which the last-named defendant filed a cross-complaint. From a judgment in favor of the bank, plaintiff and defendant Holzbog appeal. *Affirmed.*

*Charles D. Kelso*, for appellants.

*Stotsenburg & Weathers, Wilmer T. Fox and Stan-  
nard & Howard*, for appellee.

**FELT, C. J.**—Appellant John G. Webb brought this suit against appellee, and made the appellant George H. Holzbog a party to answer to his interest in the controversy. Appellant Holzbog filed a cross-complaint against appellee. The trial court sustained a demurrer to the amended complaint, and also to the cross-complaint. Each of the appellants excepted to the rulings of the court, refused to plead over, and elected to stand upon their respective pleadings and the rulings of the court on the several demurrers thereto. Thereupon the court rendered judgment against each of the appellants, from which each has appealed to this court, and assigned separate errors questioning the correctness of each of the aforesaid rulings of the court.

The substance of the amended complaint, omitting

formal and unquestioned averments, is as follows: On June 2, 1905, appellant Webb executed his promissory note for \$10,000 payable to appellant Holzbog four months after date at the Citizens National Bank. To secure the payment of such note the maker deposited with the payee twenty-eight certain bonds issued by the Columbus, Delaware and Marion Railway Company of the par value of \$14,000. On June 8, 1905, said Holzbog indorsed said note and deposited it and said bonds, together with nine other bonds of the German Savings and Loan Association of the par value of \$9,000, with appellee bank, and thereby procured a loan of \$10,000 for four months less discount thereon; that the note was renewed from time to time, the last being made on June 4, 1909, but, instead of executing the renewal notes like the original note, said Holzbog joined Webb as a maker thereof, "although in fact and in truth, and with the knowledge of said bank, the said Holzbog was merely surety thereon"; that on November 29, 1913, during regular banking or business hours, before appellee had foreclosed or otherwise enforced its lien against said bonds, or either of them, "Mr. George H. Voight for and upon the behalf of said defendant, Holzbog, requested" appellee to furnish him on behalf of said Holzbog, the amount due on the last renewal note aforesaid, and in compliance with such request appellee furnished a statement in writing purporting to show the amount due on said note on December 1, 1913, and stated such amount to be \$9,409.33; that thereupon said Voight, for and on behalf of said Holzbog for the purpose of paying said note and discharging said bonds from the lien of said debt, tendered appellee "in full payment of the amount so stated by

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the said defendant bank to be due it at said time on said note and necessary to discharge said bonds from said lien thereon" the sum of \$9,409.33 in lawful money of the United States of America, "and at the same time and place demanded that said defendant bank surrender said bonds to him, the said George H. Voigt, as the agent of said defendant George H. Holzbog, but that the defendant bank did neither accept said money so tendered to it as aforesaid nor surrender said bonds, but in lieu thereof delivered to said George H. Voigt the following, to wit:

"Jeffersonville, Indiana, Nov. 29, 1913.

"The Citizens Bank of Jeffersonville, Indiana, hereby acknowledges a tender of Nine Thousand Five Hundred Dollars, in lawful money, made to it this day by George H. Voigt for George H. Holzbog, who demanded the delivery to him of the Webb-Holzbog note of Ten Thousand Dollars, subject to credits, together with the collateral on same, being fourteen thousand dollars C., D. & M. Ry. Five Per Cent Consolidated Bonds, and, also, demanded the delivery of Seven Thousand Dollars German Savings and Loan Association bonds, in the possession of said bank, which demand and tender was refused by said bank.

"(Signed) Citizens National Bank,  
John C. Zulauf, President."

\* \* \*

"Plaintiff further avers that upon the said tender of the said amount due said defendant bank and its refusal to accept the same, the lien of said defendant bank upon and against said bonds was then and there and thereby lost, canceled, and extinguished and that,

in consequence thereof, the said bonds are not now subject to the said lien of the said defendant bank."

The prayer was for a temporary injunction to enjoin appellee from in any way enforcing any claim or lien against the twenty-eight railroad bonds until the final hearing, and that upon such hearing the court find and decree that by the aforesaid tender appellee's lien thereon was extinguished; that appellee be ordered to deliver said bonds to appellant Webb freed and discharged from any claim thereto or lien thereon by the defendants; that said bank be perpetually enjoined from asserting any claim to or enforcing any lien upon such bonds, and plaintiff be granted all proper relief in the premises.

Most of the facts alleged in the cross-complaint of Holzbog relating to the several transactions are identical with those of the complaint, and, without repeating them, we shall consider them as a part of the material averments of the cross-complaint.

It is therein alleged that contemporaneously with the deposit of such bonds as collateral security, certain written memoranda were executed as follows:

"Jeffersonville, Indiana, June 8, 1905.

"Whereas, George H. Holzbog has offered for discount at the Citizens National Bank of Jeffersonville, Indiana, the promissory note of John G. Webb, dated June 2nd, 1905, for Ten Thousand Dollars, payable four months after date, with Fourteen Thousand Dollars of Columbus, Delaware & Marion Railway Company bonds, numbered 2689 to 2716, inclusive, attached as collateral; and

"Whereas, said Holzbog has endorsed said note, guaranteeing payment thereof.

“Now, Therefore, said Holzbog further pledges, to secure payment of said note or any renewal thereof, including interest, and on the same terms and conditions as said railroad bonds are pledged, Nine Thousand Dollars of the bonds of the German Savings and Loan Association of Jeffersonville, Indiana, and numbered 931, 940, 941, 943, 944, 942, 915, 933, and 910, at One Thousand Dollars each, said latter bonds being the property of said Holzbog and to be delivered to said Holzbog upon full payment of said note and interest as above pledged.

“(Signed) George H. Holzbog.”

\* \* \*

Indorsed across the face of it by the president of the Citizens National Bank is the following:

“Copy of the collateral agreement of George H. Holzbog attached to George G. Webb’s note dated June 2nd, 1905, for Ten Thousand Dollars and discounted with the Citizens National Bank, Jeffersonville, Indiana, June 8th, 1905.

“(Signed) John C. Zulauf, President.”

It is also alleged that on the 14th, 15th and 17th days of November, 1913, appellee bank gave public notice in the newspapers, and elsewhere, in the city of Jeffersonville, that on December 1, 1913, at the door of the courthouse in said city, it would sell said twenty-eight railway bonds; that cross-complainant signed the note as surety, and not as principal, and that upon tender of the full amount due thereon and the refusal of the bank to accept said tender, he was discharged from all liability as such surety and was entitled to the aforesaid collateral; that the bank

still retains said bonds and claims to have a lien thereon, and that cross-complainant is liable on said note. Prayer that appellee be enjoined from enforcing collection of the note from Holzbog and be required to return to him the collateral deposited to secure payment of the note aforesaid.

Numerous statements are made in the memoranda accompanying the aforesaid pleadings to show that the same are insufficient to state a cause of action.

It is charged that the complaint is bad because it fails to show that George H. Voigt had authority from either Webb or Holzbog to make the tender or receive from appellee the bonds held as collateral security; that it is not shown that the tender was unconditional, but the averments show that it was a conditional tender only, depending on the delivery of the bonds; that the tender has not been kept good by paying the amount thereof into court for the benefit and use of appellee; that the matters alleged in the complaint are not such as should be inquired into by a court of equity; that it is not shown that neither of said appellants was not otherwise indebted to appellee than as evidenced by said renewal note, at the time of the alleged tender; that the averments fail to show that the amount tendered was the full amount due appellee at the time the tender was made.

The points of the memoranda in reference to the cross-complaint are in substance identical with the foregoing.

Under numerous decisions of our Supreme Court following the case of *Domestic Block Coal Co.*

1. v. *DeArme* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, all reasonable inferences deducible from the facts alleged may be considered in aid of pleadings.

In the light of these decisions we think the averments of the complaint are sufficient to show the authority of Mr. Voigt as agent of Holzbog in

2. making the tender and demanding the bonds; also that the amount tendered was the full amount due on the note executed by appellants; that the tender so made was sufficient to make a *prima facie* case against appellee in so far as the amount of the tender was involved, and also as to its duty to return the bonds held as collateral security for the note in question, upon payment of the note, if the effect of the tender was not destroyed by the conditions imposed.

A fair and reasonable construction of the averments of the complaint indicate that Mr. Voigt tendered the full amount of money appellee's statement showed to be necessary to pay in full the last renewal note aforesaid, and that concurrently with the surrender of the money so tendered he demanded the delivery to him of the note and the bonds pledged as collateral security therefor.

In a recent case this court held that the general rule is well established that a tender, to be sufficient, must be unconditional, but recognized certain exceptions to the general rule, and said: "A more accurate and comprehensive statement of the general rule, perhaps, would be that the tender to be good must not be accompanied by any condition to which the party to whom it is made has any legal right to object, and is not invalidated by being coupled with a condition which the party making it has the right to impose and to which the other party cannot reasonably object." *Newman v. Horner* (1914), 55 Ind. App. 298, 302, 103 N. E. 820; *Jordan v. Johnson* (1912), 50 Ind. App. 213, 218, 98 N. E. 143.

There is authority outside our own state for applying the foregoing rule in cases like the one under consideration, on the theory that payment of the note or lawful tender of the full amount due thereon is performance of the contract for which the bonds were pledged as collateral security, and *prima facie* ends the right of the holder of such securities to retain them; that payment of the note or such lawful tender, and the surrender of such securities, may be treated as simultaneous or concurrent acts, since under such conditions the holder of such securities has no reasonable ground for objecting to surrendering them. *New York Assets, etc., Co. v. McKinnon* (1913), 209 Fed. 791, 126 C. C. A. 515; *Halpin v. Phenix Ins. Co.* (1890), 118 N. Y. 165, 175, 23 N. E. 482; *Mitchell v. Roberts* (1883), (C. C.) 17 Fed. 776, 780; *Cass v. Higenbotam* (1885), 100 N. Y. 248, 253, 3 N. E. 189; *Strafford v. Welch* (1879), 59 N. H. 46; 28 Am. and Eng. Ency. Law 31; 38 Cyc 152-154.

The precise question whether a demand for the surrender of collaterals pledged to secure the payment of a note will vitiate an otherwise lawful tender of the amount due on such note does not seem to have been decided in this state, but there are decisions which by analogy tend to show that such demand would be treated as a condition which cannot lawfully be imposed in making a tender. *Storey v. Krewson* (1876), 55 Ind. 397, 399, 23 Am. Rep. 668; *Morrison v. Jacoby* (1888), 114 Ind. 84, 92, 14 N. E. 546, 15 N. E. 806.

However, the conclusion we have reached on other questions renders it unnecessary to decide the question at this time. Where a tender is made for

3. the amount of a debt for which securities are held, and the tender is refused, there is author-



ity for holding that such tender of the full amount due will operate to cancel or release the lien on such securities, and under certain conditions may be taken advantage of by the party entitled to the securities without keeping the tender good by paying the amount into court. The decisions are conflicting as to the effect of such tender and refusal where the tender is made after default in payment of the debt at maturity. *McClellan v. Coffin* (1884), 93 Ind. 456, 463; *Parker v. Beasley* (1895), 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, and notes; *Mitchell v. Roberts*, *supra*; *Cass v. Higenbotam*, *supra*; *Nelson v. Loder* (1892), 132 N. Y. 288, 30 N. E. 369, 370; *Weeks v. Baker* (1890), 152 Mass. 20, 22, 24 N. E. 905; 38 Cyc 158; 28 Am. and Eng. Ency. Law 39; 2 Jones, Mortgages §893.

However, the decided weight of authority, if not the universal rule, is that the foregoing proposition has no application where the party seeking to obtain its benefit comes into a court of equity and demands affirmative relief. In such instances the familiar rule is applied that he who seeks the aid of equity must himself do equity, and, before such party can obtain an affirmative decree in his favor by virtue of a tender of the amount of the debt, he is required to show that he has brought the amount tendered into court for the benefit of his adversary to the end that no possible question may thereafter be raised, or litigation result, over the right to the money so tendered. *Morrison v. Jacoby*, *supra*; *Lancaster v. DuHadway* (1884), 97 Ind. 565, 566; *Bundy v. Summerland* (1895), 142 Ind. 92, 94, 41 N. E. 322; *Smith v. Felton* (1882), 85 Ind. 223, 224; *Hazelett v. Butler University* (1882), 84 Ind. 230, 237; *Wilson v. McVey* (1882), 83

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Ind. 108; *McWhinney v. Brinker* (1878), 64 Ind. 360, 364; *Halpin v. Phenix Ins. Co.*, *supra*; *Breunich v. Weselman* (1885), 100 N. Y. 609, 610, 2 N. E. 385; *Tuthill v. Morris* (1880), 81 N. Y. 94, 99; *Cowles v. Marble* (1877), 37 Mich. 158, 161; *O'Riley v. Suver* (1873), 70 Ill. 85, 87; *Nelson v. Loder*, *supra*; 2 Jones, Mortgages §§892, 893.

In *Morrison v. Jacoby*, *supra*, the Supreme Court said: "The amount due the defendants is due unconditionally, is liquidated, and is a claim which equity and law made it the duty of the plaintiffs to pay. In such a case money ought to be paid into court, so that the defendant may take it out if he chooses. It is not equitable that the plaintiffs, by merely offering to pay what they long before should have paid, should be allowed to keep the money from the defendants until a final decree puts an end to the controversy. Surely, the plaintiff asking equity in such a case must do more than make a mere offer to pay only in the event that it is so ordered, or after the lien is judicially declared. It is no hardship upon him to pay the money into court, while his failure to do so might work injury to the defendant. It would, at all events, abridge the right of the defendant to elect to take it out. \* \* \*

It is not easy to perceive why, in such a case as this, there should be any distinction between actions at law and suits in equity. We think there is really none, and what was said of a party in a somewhat similar case may be here appropriately said of the appellees: 'If he pretends to avail himself of the plea of tender in equity, because he could not make it at law, he ought to be held to as great strictness as he would be held to at law.' \* \* \*

The argument proceeds upon the theory that the equity rule that an offer

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without an actual tender is sufficient, governs the case, and we are referred to the cases which hold that in suits for specific performance a strict tender is not necessary. These authorities are, it is manifest, not in point in an action like this, where the plaintiff asks to be relieved from a demand which the law imperatively made it his duty to pay, and which another had paid for him. \* \* \* The principle declared in the case from which we quote is a sound one. It is so, because a tender properly made stops all interest, and, certainly, he who makes it ought not to be allowed to retain the money through a course of litigation and still be relieved from the payment of interest. It is so, because a tender where a sum is unconditionally due is only good when the money is brought into court."

In *Lancaster v. DuHadway*, *supra*, the Supreme Court said: "The appellee insists that the complaint was insufficient, because the appellants do not aver that they bring the money tendered into court for him, or offer to pay it upon obtaining the relief demanded. This objection is well taken. The complaint is an application to a court of equity to cancel a certificate of purchase and to enjoin the auditor from executing a deed to the purchaser. This invokes the equitable aid of the court, and it is well settled that a court of equity will not extend its aid to a party who does not himself do equity. \* \* \* This rule requires a party who seeks the equitable aid of a court, in order to protect himself against his adversary in such case as this, to bring the money due him into court, so that he can take it when the relief is granted. The tender of the money does not pay the debt, and if the relief were granted without requiring its payment, the court

would deprive the purchaser of his only protection by destroying the muniments of his title while the money due him remains unpaid. This a court of equity will not do. \* \* \* The money due is not paid. Though it was tendered, and its payment refused, it still remains unpaid, and so long as it remains unpaid, and the appellants do not offer to pay, a court of equity will not assist them. If this is nothing more than an application to cancel the certificate and to enjoin the execution of the deed, still the application is to a court of equity to obtain its aid in order to prevent the purchaser from enforcing his claim through these muniments of his title. It is therefore immaterial whether the complaint is regarded as a bill to redeem or to cancel the certificate and enjoin the execution of the deed. In either case the same principle is involved, and the same rules control.”

In *Breunich v. Weselman, supra*, the New York Court of Appeals said: “It has been held that an offer to pay the amount due on the mortgage, either at the law day or thereafter before foreclosure, will extinguish the security, although the tender is not kept good and the money brought into court. \* \* \* But that rule does not apply where the affirmative relief of a cancellation of the security is sought and granted, as was the case here.”

In *Tuthill v. Morris, supra*, the same court, in speaking of the effect of a tender not brought into court, said: “We are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks \* \* \*. A party coming into equity for affirmative relief must himself do equity, \* \* \*.”

The foregoing propositions and authorities are de-

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cisive of the case at bar, and compel the conclusion that the trial court did not err in either of the rulings complained of by appellants.

Judgment affirmed.

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RUBENS v. UNITED STATES CASUALTY COMPANY.

[No. 9,776. Filed April 18, 1919.]

1. PLEADING.—*Complaint Founded on Written Instrument.—Variance.*—In an action on an accident insurance policy, where the averments of the complaint as to the terms of the policy vary from the provisions thereof, the provisions of the policy control. p. 37.
2. INSURANCE.—*Accident Insurance.—Construction of Policy.—Beneficiary Indemnity.—Cause of Injury.*—An accident insurance policy insuring against injury to the beneficiary while a passenger in a railroad passenger car, steam vessel, passenger elevator, or in consequence of the burning of a building, does not cover death resulting from injury while in an automobile. p. 39.

From Marion Superior Court (101,979); *W. W. Thornton*, Judge.

Action by George B. Rubens against the United States Casualty Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Guilford A. Deitch* and *Frank G. West*, for appellant.

*Fesler, Elam & Young*, for appellee.

NICHOLS, J.—This was an action by the appellant to recover on a policy of accident insurance in the sum of \$5,000, under a provision entitled "Beneficiary Indemnity," on account of the death of appellant's sister, Dessa Rubens, who was the beneficiary named in the policy.

Appellee's demurrer to the appellant's amended complaint was sustained, to which ruling the appellant excepted, and refused to plead further. Judgment was rendered against appellant. From the ruling of the court in sustaining the demurrer to the amended complaint, the appellant appeals. This is the only error assigned.

So much of the complaint as is necessary to this decision is as follows: "Plaintiff says that several days preceding the issue of the policy hereinafter referred to, he was solicited by one of the defendant's agents to make application for said policy; that as one of the inducements to making said application, the said agent represented to plaintiff that said policy would not only cover him against all of the risks insured by said policy, but would also insure the beneficiary to be named in said policy against any loss so long as the same resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means; that at said time said agent called plaintiff's attention to section 10 of the form of policy issued to him entitled "Beneficiary Indemnity" and represented and stated to plaintiff that in the event of the death of the beneficiary named by him, if said death was caused by bodily injury effected solely through external, violent and accidental means, or in the event of any of the losses set forth in the schedule of "Beneficiary Losses" arising from injuries so caused, there would be paid to him the sum so specified in such schedule for the loss so sustained; and then and there stated to plaintiff that by subdivisions 1, 2, 3 and 4 of said section 10 it was intended to fix the amount payable on account of any accident so caused but not

to limit the scope of the risk or to make the right to recover beneficiary indemnity depend in any way upon the manner or place in which the injury was sustained, so long as it was solely through external, violent and accidental means. Plaintiff says that he relied upon the statements and representations made by said agent, and upon the construction placed by said agent on the language employed in said policy and so relying made application to the defendant for the policy sued on."

The policy was issued October 19, 1909, and thereafter renewed from time to time, thereby covering the time of the accident hereinafter mentioned. A copy of the policy, marked "Exhibit A," is made a part of the complaint. Appellant avers his

1. interpretation of section 10 of the policy, but we do not quote this part of the complaint, as the section itself, as hereinafter set out, controls the averments. *Harrison Bldg., etc., Co. v. Lackey* (1897), 149 Ind. 10, 14, 48 N. E. 254. It is further averred that the said beneficiary, Dessa Rubens, who was over eighteen and under sixty years of age, on July 2, 1915, sustained bodily injury effected through external, violent and accidental means while riding in an automobile, which skidded from the road and turned over, thereby injuring her, from which injuries, directly and independently of all other causes, she died on the first day. So much of the policy, exhibit A, as is necessary to this decision, is as follows:

"In Consideration of Twenty-Five and 00/100 Dollars premium and the statements contained in the "Schedule of Statements" attached hereto and hereby made a part thereof, which statements the Insured makes and warrants to be true and

material by the acceptance of this Policy, the United States Casualty Company, herein called the Company, insures, subject to the provisions and conditions and limits therein, George B. Rubens, Indianapolis, Indiana, herein called the Insured for twelve months beginning at noon, standard time, on the Fourteenth day of November, 1909, against loss resulting directly and independently of any and all other causes from bodily injury effected solely through external, violent and accidental means, herein called such injury, as follows:"

Section X—Beneficiary Indemnity (stripped of its verbiage not pertinent to the question involved), reads:

If on the date of the event causing such injury, such beneficiary is over eighteen and under sixty years of age, and if such injury is sustained—(1) while such beneficiary is a passenger and is on board a railroad passenger car \* \* \* (2) or while a passenger on board a steam vessel \* \* \* (3) or while a passenger within a passenger elevator \* \* \* (4) or in consequence of the burning of a building \* \* \* and any one of the losses enumerated in the "Schedule of Beneficiary Losses" set forth below shall result directly from such injury within ninety days from the date of the event causing such injury and independently of any and all other causes, the Company will pay, subject to the provisions and conditions herein, the amount specified for such loss in said schedule.

Schedule of Beneficiary Losses.

Loss of Life.....\$5,000



Appellant contends that where the policy contains inconsistent provisions, or terms requiring construction, that view will be adopted which will sustain rather than forfeit the contract, citing, with other authorities, *Supreme Council, etc. v. Grove* (1911), 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913. He further contends that, the language of the policy being ambiguous, the agent's explanations as to what was intended should be followed, citing, with other authorities, *Stockwell v. Whitehead* (1911), 47 Ind. App. 423, 94 N. E. 736; *Ditchey v. Lee* (1906), 167 Ind. 267, 78 N. E. 972. It will be observed that the principle decided by these cases is not as liberal as the proposition contended for by appellant, but it is not necessary to discuss this proposition to decide this case.

We do not see how the section could have been made more unambiguous. "Such injury" clearly refers to an injury to a person more than eighteen and

2. under sixty years of age, who was at the time of injury in a passenger car, or a steam vessel, or in a passenger elevator, or in a burning building, and then the loss from such injury must be enumerated in the "Schedule of Beneficiary Losses," or there can be no recovery. Any other construction would do violence to good English. The beneficiary was not in any one of these places mentioned in the policy, but was in an automobile, and death by injury while in an automobile is not covered by the policy sued on. The demurrer to the complaint was properly sustained.

The judgment is affirmed.

## UNION TRACTION COMPANY OF INDIANA v. SMITH.

[No. 9,706. Filed April 18, 1919.]

1. **CARRIERS.—Carriage of Passengers.—Ejection of Passenger.—Liability.**—Where a passenger, after paying fare entitling him to transportation, is required by the carrier to change cars, and through the mistake or negligence of the carrier's agent is given a defective ticket as evidence of his right to continue his journey on the car designated by the carrier, and the conductor, disregarding the passenger's explanation, ejects him, the carrier is liable. p. 44.
2. **CARRIERS.—Carriage of Passengers.—Change of Cars.—Defective Ticket.—Rights of Passenger.**—Where a passenger, after purchasing a through ticket, was required to change cars at a way station, and was told by the conductor, who had taken up her ticket, to take passage on a certain car, she was rightfully upon such car and entitled to continue her journey, though the conductor had given her a defective ticket. p. 44.
3. **CARRIERS.—Carriage of Passengers.—Rules of Company.—Right to Establish.—Duty of Passenger.**—In the absence of a statutory provision, a carrier may make reasonable rules and regulations respecting the time, places and circumstances under which certain trains will stop, etc., and it is the duty of a person taking passage on such trains to inform himself as to such rules and regulations, and, if he makes a mistake not induced by the carrier, he has no recourse. p. 46.
4. **CARRIERS.—Carriage of Passengers.—Rules and Regulations.—Duty of Carrier.**—A carrier must provide reasonable means by which passengers may acquaint themselves with its rules. p. 46.
5. **CARRIERS.—Carriage of Passengers.—Threatened Ejection of Passenger.—Action.—Jury Questions.—Passenger's Violation of Rules.**—In a passenger's action against an interurban railroad company to recover damages for threatened ejection from a car, where there was evidence to show that she was riding on a through ticket containing a condition "no stop-overs allowed," that at a way station she was ordered by defendant's conductor to change cars, but was not informed of, or directed to, a particular car in waiting to take passengers discharged from the car on which she had arrived, and that she remained in the waiting room an hour before taking the next car to her destination, the question whether she had voluntarily and without fault

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of the carrier taken the later car, in violation of the stop-over provisions of the ticket, was for the jury. p. 46.

6. **CARRIERS.—Carriage of Passengers.—Ejectment of Passenger.—Damages.—Mental Distress.**—In a passenger's action against an interurban railroad company for threatening to eject her from a car unless she paid a cash fare, the conductor having declined to accept a defective ticket, it was proper to consider humiliation and mental distress in determining the amount of compensatory damages to which plaintiff was entitled, regardless of physical injury. p. 47.
7. **APPEAL.—Review.—Instructions.—Applicability to Evidence.**—In a passenger's action against an interurban railroad for threatened ejectment unless she paid a cash fare, the conductor having declined to accept a defective ticket, an instruction that, if the passenger had done what was necessary under the carrier's rules to entitle her to transportation, the carrier was liable for her threatened expulsion, by reason of the conductor's mistake or want of judgment, although he, under the circumstances, acted in good faith, was not objectionable as being inapplicable to the evidence, even though it showed that plaintiff had not complied with defendant's rules in boarding the car from which ejectment was threatened, where there was evidence to warrant a finding that such failure to comply with the company's rules was induced by defendant's negligence. p. 47.
8. **APPEAL.—Waiver of Error.—Briefs.**—Error, if any, in the giving of an instruction on the measure of damages is waived by the appellant's failure to present the question of excessive damages in its brief. p. 48.
9. **APPEAL.—Review.—Harmless Error.—Instructions.**—The giving of an instruction on the measure of damages which does not limit the jury to a consideration of the evidence applicable to the injuries sustained by plaintiff was harmless, where there was no evidence introduced which could furnish an incorrect basis for the assessment of damages. p. 48.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by Pearl Smith against the Union Traction Company of Indiana. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*J. A. VanOsdol* and *Kittinger & Diven*, for appellant.

*James M. Leathers*, for appellee.

REMY, J.—This is an action by appellee against appellant for damages. To the complaint appellant demurred for want of sufficient facts, which demurrer was overruled; whereupon appellant filed an answer in denial. The cause was tried by a jury, resulting in a verdict and judgment for appellee in the sum of \$300. The errors assigned are: (1) The overruling of appellant's demurrer to the complaint; and (2) the overruling of the motion for a new trial.

It is charged in the complaint, in substance, that the appellant operated a traction line between the cities of Logansport and Indianapolis, and that appellee, desirous of being transported from the former to the latter city, boarded one of appellant's cars at Logansport, having previously purchased from the appellant a through ticket, paying therefor the sum of \$1.55, by reason of which she "was entitled to passage" upon appellant's car "from Logansport to Indianapolis," which ticket was taken up by appellant's conductor soon after appellee boarded the car, and in lieu thereof appellee was given a small plain ticket or hat check; that while enroute, and just before arriving at the city of Kokomo, appellant's said conductor announced to appellee, and to all on the car who were passengers for Indianapolis, that they would have to change cars at Kokomo, "that it was then and there necessary to leave said car and take another car" at said station of Kokomo in which to continue the journey; "that in pursuance to said request and demand" appellee "left said car and took passage on another car of defendant company at said station \* \* \* for the purpose of being carried and transported thereby to her destination;"

that in giving appellee the plain ticket or check, the conductor in charge of appellant's car from which she alighted at Kokomo wrongfully and negligently failed to provide her with a proper ticket, or with proper evidence of her right to be transported to the city of Indianapolis upon the car upon which she took passage pursuant to his "request and demand;" and that the car upon which appellee took passage at Kokomo had not proceeded far until appellant's conductor in charge thereof, and while taking fares, refused to accept from appellee the plain ticket or check as evidence of her right to be transported upon said car, although she fully explained to him that she had bought and paid for a ticket authorizing her to be carried from the city of Logansport to the city of Indianapolis, which ticket had been taken up by the conductor on the other car, which conductor had given her the plain ticket, and that she was presenting the same in accordance with directions given her by the former conductor; that said conductor not only refused to accept her explanation, but in the presence of other passengers wrongfully and in an offensive manner told her "that she would not get by or beat her way through on any such talk as that," and that she must pay a cash fare of \$1.10 covering her transportation from Kokomo to Indianapolis, or he would stop the car, and eject her immediately; that upon her refusal to pay the additional fare, the conductor did stop the car for the purpose of ejecting her, whereupon the appellee paid the extra fare to save herself the embarrassment of being ejected; and that by reason of said conductor's negligent and wrongful conduct, and by reason of all the facts alleged, she suffered great shame, humiliation and distress, to her

damage in the sum of \$1,000, for which sum judgment is demanded.

If, after a passenger has paid his fare entitling him to be carried from one point to another on the carrier's line, it becomes necessary for such

1. passenger, under the rules and regulations of the carrier, to change cars, and such passenger, through the mistake or negligence of the carrier's agent on the first car, is given a ticket which is insufficient evidence of his right to continue his journey on the car designated by the carrier, and the conductor on the second car fails to heed the passenger's statement or explanation, and ejects him, the carrier will be liable. *Indianapolis St. R. Co. v. Wilson* (1903), 161 Ind. 153, 66 N. E. 950, 67 N. E. 993; *Indiana R. Co. v. Orr* (1908), 41 Ind. App. 426, 84 N. E. 32.

The only objection to the complaint presented by appellant in its brief, which was specified in its memorandum filed with the demurrer, is that the

2. complaint does not aver facts showing that appellee was rightfully upon the car which she boarded at Kokomo; and that the ticket she had purchased entitled her to ride upon that car. It will be seen that it is specifically alleged in the complaint that appellee purchased from appellant, and delivered to the conductor on the car she boarded at Logansport, "a ticket which entitled her to be transported" over appellant's traction line "from the city of Logansport to the city of Indianapolis," and that upon the arrival of the car at Kokomo station appellant's conductor called upon appellee and all passengers for Indianapolis to change cars, and "that pursuant to said demand and request" appellee "took passage on another car" of appellant at said point. If, as alleged,

appellee boarded the car on which she took passage at Kokomo "pursuant to the request and demand" of appellant's conductor, who had taken up her through ticket, and who had given her the plain check, then she was rightfully upon, and entitled to passage upon, that car. There was no error in overruling the demurrer to the complaint.

It is contended with much earnestness that the verdict of the jury is not sustained by the evidence. The evidence shows that the ticket purchased by the appellee contained the condition "no stop-overs allowed," and that such form of ticket had been filed with, and approved by, the Public Service Commission of Indiana, and that it was the rule of appellant company that no stop-overs would be allowed on local tickets; that it became necessary to change cars at Kokomo, and that when the car on which the appellee took passage at Logansport arrived at the Kokomo station there was waiting at such station a car of appellant's known as the Winona Flyer, on which passengers to Indianapolis, other than appellee, took passage, and that from Kokomo to Indianapolis the Winona Flyer was in charge of the same crew that brought from Logansport the car on which appellee had been a passenger; that appellee did not see the Winona Flyer, and did not know it was there, and that it was not pointed out to her by appellant's servants or anyone else, and that she was not directed to board any particular car, but, upon leaving the car on which she had come from Logansport, she entered the waiting station of appellant, where she remained about an hour, and took the next car for Indianapolis. The remainder of the material evidence shows the facts to be substantially as averred in the complaint.

It is contended by appellant that under its rules appellee was entitled to no stop-over at Kokomo, and that she was required to take the Winona Flyer

3. at that station, and that the evidence shows that in taking the car she did she violated this rule and regulation, and was without right upon the car from which ejectment was threatened. It is the law that, in the absence of a statutory provision, a carrier may make reasonable rules and regulations respecting the time when, the places where, and the circumstances under which, certain cars or trains will stop, etc., and it is the duty of a person taking passage via such cars and trains to inform himself as to such rules and regulations, and if he make a mistake not induced by the carrier, he has no recourse. *Evansville, etc., R. Co. v. Wilson* (1898), 20 Ind. App. 5, 50 N. E. 90. It is also the law that the carrier

4. must provide reasonable means by which passengers may acquaint themselves of its rules; and it has been held that, if such rules are intended for the entire public, notice thereof must be such as to leave no doubt that it reaches all who are to be affected by it. *Railroad v. Turner* (1898), 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

It was not in evidence that appellant company had given notice to the public, or had promulgated a rule, that the car of appellant known as the Winona

5. Flyer would be waiting at Kokomo, and that all passengers from Logansport to Indianapolis, leaving the former city, as did appellee, would be expected to transfer to said car. In fact, the evidence showed no rule of the company, except that no stop-over would be allowed on a local ticket. Under the facts in this case as shown by the evidence, it was



proper to submit to the jury the question as to whether or not appellee had voluntarily, and without fault of appellant, taken the later car, in violation of the company's rule, and in violation of the stop-over provisions of the ticket.

It is further claimed by appellant, that there is no evidence showing that appellee suffered any physical injury, and that shame, humiliation and mental

6. distress, disconnected from physical injury, cannot be made the basis of any recovery. The complaint seeks to recover only compensatory damages, and the case was tried upon that theory. It is the settled law of this state that where a right of action had accrued in a cause of this character, humiliation and mental distress are properly considered in determining the amount of compensatory damages to which the plaintiff is entitled, regardless of physical injury. *Indiana R. Co. v. Orr, supra*, and cases cited. The verdict is sustained by the evidence.

Among the eight instructions given by the court which are complained of, No. 6, given at the appellee's request, is pointed out as especially ob-

7. jectionable. It is as follows: "I instruct you that if the passenger has done what is necessary under the rules of the carrier to entitle him to transportation, the carrier will be liable for his expulsion or threatened expulsion, by reason of the mistake, or want of judgment on the part of the conductor, although the conductor, under the circumstances, acts in good faith."

It is urged that this instruction is not applicable to the evidence in this, that there is no evidence that appellee had complied with the rules in boarding the car from which ejectment was threatened; it being

appellant's position that, under the rule of the company against stop-overs, appellee was required to board the car in waiting upon her arrival at Kokomo. The evidence did not show any rule of appellant which required appellee to take the particular car known as the Winona Flyer. The evidence showed that appellee had no notice as to this car, and no notice that close connection would be made with any car. If appellee's failure to take the Winona Flyer could be considered a violation against a stop-over, then there is evidence from which the jury might have found that appellee's failure to comply with the rule was induced by the negligence of appellant.

Objection is made to instruction No. 5, given on the court's own motion. This is an instruction on the measure of damages. The objection is that

8. it does not limit the jury to a consideration of the evidence applicable to the injuries complained of by appellee. The error, if any, in the giving of this instruction is waived by appellant's failure in its brief to present the question of excessive damages. However, if it could be said that appel-

9. lant had presented the question as to excessive damages, the giving of the instruction could not have harmed appellant, since the record does not show that any evidence was introduced which could furnish an incorrect basis for the assessment of damages. *Inland Steel Co. v. Gillespie* (1914), 181 Ind. 633, 104 N. E. 76. We have examined the other instructions of which complaint is made. Some of them are incomplete, but, when taken in connection with all the instructions given, they fairly present the law of the case.

We find no reversible error. Judgment affirmed.

## KIPFER ET AL. v. POLSON.

[No. 9,826. Filed April 24, 1919.]

**APPEAL.—Presenting Questions for Review.—Evidence Not in Record.**—Where each of the questions presented for review on appeal requires for its determination a consideration of all the evidence, and the bill of exceptions affirmatively shows that the evidence is not all in the record, the judgment of the trial court is conclusive.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action between Edward W. Polson and James E. Kipfer and another. From the judgment rendered, the latter appeal. *Affirmed.*

*Hess & Hess* and *Charles Killison*, for appellants.  
*H. A. Logan* and *Lauer & Kitch*, for appellee.

**REMY, J.**—Each of the questions properly presented by this appeal would require for its determination a consideration of all the evidence. The bill of exceptions affirmatively shows that the evidence is not all in the record. Under such circumstances the judgment of the trial court is conclusive, and on the authority of *Thorne v. Indianapolis Abattoir Co.* (1899), 152 Ind. 317, 52 N. E. 147, the judgment in this case is affirmed.

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HOME INSURANCE COMPANY OF NEW YORK v. STRANGE

[No. 9,794. Filed April 24, 1919.]

1. **INSURANCE.—Agents.—Delegation of Authority.**—Generally, agents of insurance companies who are authorized to contract for risks, receive and collect premiums, and deliver policies, may confer
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upon a clerk, or subordinate, authority to execute the same powers, the service not being of a personal character. p. 54.

2. INSURANCE.—*Fire Insurance.—Notice of Vacancy.—Sufficiency.*—Under a fire insurance policy stipulating that the policy would be void if any of the buildings insured remained vacant for more than ten days without the insurer's consent, a notice of vacancy was sufficient when given to the bookkeeper and policy clerk employed by agents for the insurance company, upon her assurance that she would take a note of the notice and bring it to the attention of one of the agents on his return to the office. p. 55.
3. INSURANCE.—*Notice to Agency for Insurer.*—Notice to the agent of an insurance company is binding, though not communicated to it. p. 57.
4. INSURANCE.—*Fire Insurance.—Conditions.—Vacancy.*—The condition in a fire policy that vacancy of the building insured without the written consent of insurer shall avoid the policy, being a stipulation in favor of the company, may be waived by express agreement or conduct, and such waiver can be by the promise, failure and conduct of the company's authorized agent. p. 57.
5. INSURANCE.—*Fire Insurance.—Breach of Conditions.—Failure to Assert Forfeiture.*—Where a fire insurance company had notice of the purpose of insured to change the use of a dwelling to that of storage house, and it failed to assert its right of forfeiture, it waived such right. p. 57.
6. APPEAL.—*Review.—Harmless Error.—Exclusion of Evidence.*—In an action on a fire policy, error, if any, in excluding a letter, written by insured in negotiations for compromise, containing an admission of blame, was harmless, where the insurer's agent testified to the same admission made by insured to him, and such admission was not denied by insured. p. 58.

From Grant Superior Court; *Robert M. VanAtta*, Judge.

Action by James B. Strange against the Home Insurance Company of New York. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*John H. Edwards* and *Condo & Browne*, for appellant.

*Meade S. Hays*, for appellee.

NICHOLS, J.—This action was commenced in the Superior Court of Grant county, May 14, 1916, by the

appellee against the appellant on a fire insurance policy, for damages for the loss of a building by fire, such building being a portion of the property covered by said policy. The policy contains the following provision:

“If the premises described shall be occupied for other than farm purposes or if any of the buildings described are now vacant, unoccupied or uninhabited, or shall become vacant, unoccupied or uninhabited, and so remain for a period exceeding ten days, without written consent hereon, then \* \* \* this policy shall be null and void. \* \* \* This company reserves the right to cancel this policy or any part thereof, by tendering to the assured the unearned prorated premium, after due notice to that effect, etc. \* \* \* The Secretary or Assistant Secretary of the Western Farm Department, at Chicago, Ill., alone shall have authority to waive or alter any of the terms or conditions of this policy.”

The amended complaint contains the following averment: “That at the time said building No. 3 was insured, the same was being used as a dwelling house; that said building continued to be used by this plaintiff as a dwelling house until the 27th day of February, 1913; that upon said last named date, this plaintiff informed the firm of Cushwa & Presnall, who were the duly acting and authorized agents of said defendant company at that time, that from and after the said 27th day of February, 1913, he would cease to use said building as a dwelling, but would use said building for storage purposes only; that the defendant company well knowing the purposes and inten-

tions of this plaintiff, failed and neglected to cancel said policy, to return or offer to return to said plaintiff the unearned premiums on said building, or any part thereof, and failed and neglected to notify said plaintiff that the insurance on the said building would not continue to be in force, or to inform him in any manner or form, that said building was not fully protected by said policy; that no notice was ever given to the plaintiff that said policy was held to be null and void, or that said protection had been withdrawn by said defendant company, until after the said building had been consumed by fire on the 17th day of May, 1914; and that plaintiff avers and charges that by reason of said company failing and neglecting to so notify said plaintiff or to tender back to him the unearned premiums, or to cancel his policy, that said defendant company waived the provisions of the policy relating thereto."

The amended complaint was answered in two paragraphs, the first being a general denial, and the second averring in substance that: Plaintiff had not performed all of the conditions of said policy in that after said policy was executed and delivered, said building became vacant and that the plaintiff, by due request and application therefor, received two separate, distinct vacancy permits, the last of which expired December 9th, 1912, prior to the alleged fire, and that no other permit had been applied for and that the building was vacant at the time of the fire; that as soon as the defendant learned of the vacancy of the said building, which was after said fire, it promptly offered plaintiff to return to him the entire amount of premium paid by him covering said building, but the plaintiff refused to accept the same.

The appellee filed a reply to the second paragraph of answer, and the cause, being at issue, was submitted to the jury for trial, and a verdict for \$1,200 was returned for appellee. The court, after overruling appellant's motion for a new trial, rendered judgment on the verdict in favor of the appellee and against appellant, from which judgment this appeal is prosecuted.

The overruling of appellant's motion for a new trial is the only error assigned.

It appears by the evidence in this case that Cushwa and Presnall were the agents of the appellant insurance company, at Marion, Indiana, and had in their employ Miss Sue Wallace, who testified that she was employed as "general office girl, bookkeeper and policy clerk and general office work." She had been so employed with such agents for about eleven years. It does not appear by the evidence that these agents were the agents of any other companies than the appellant. The appellee was the holder of a policy issued to him by the appellant through the office of their said agents Cushwa and Presnall, which policy covered the period from June 7, 1910, to June 7, 1915, the amount of the insurance being \$10,000, and the consideration therefor being \$200, in installments as follows, to wit: \$50, cash; \$50, July 1, 1912; \$50, July 1, 1913; \$50, July 1, 1914. And all the installments due had been paid at the time of the fire loss, which is the occasion of this action. This insurance was upon three dwelling houses, upon other buildings such as barns, sheds, granaries, cribs and other outbuildings, and upon personal property located in such buildings as appears by the policy, and it does not appear that there was any difference in the rate of insurance upon the buildings whether

the same were used as dwellings, or barns, or for storage purposes. On February 27, 1913, appellee went to the office of the agents of the appellant and found Miss Wallace to be the only person in the office at that time; he made inquiry for either Mr. Cushwa or Mr. Presnall, and was informed by Miss Wallace that neither of the gentlemen were in the office, but that she was looking for them to return soon, and she invited him to wait. He did wait until he was compelled to leave before their return, and when leaving he informed her that he had come in to notify the appellant company that he would not use building No. 3, known in the policy as the hotel building, as a dwelling any longer, and that it would be used for storage. She then informed him that she could take note of anything that he had, and it would be as good as if Mr. Cushwa were in, as she could notify him when he came in. She took a piece of paper and made a note of the matter and placed it on her desk. Before that time appellee had been granted two vacancy permits for this building, both of which had expired. After this date the building was used as storage for automobiles, tools, clover seed, etc., and Dr. Mattson had stored some things in the building. The building was destroyed by fire May 17, 1914. It will be observed that after the conversation of February 27, 1913, between the appellee and Miss Wallace, and before the date of the destruction of the building by fire, the appellee paid another \$50 installment of the premiums.

Appellant contends that it was error to admit in evidence, over the objection and exception of the appellant, the conversation between Miss Wallace

1. and the appellee, James B. Strange, for the purpose of proving knowledge or notice to the



appellant and waiver of the vacancy provision in the policy and the written consent by appellant, and contends that the position that Miss Wallace had with the firm was not such evidence of authority as would bind the appellant upon any matter affecting the policy in suit. It is not disputed that the firm of Cushwa and Presnall were the duly appointed agents of the appellant, and that they were fully recognized as such. Generally, agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to execute the same powers. The service is not of such a personal character as to come under the maxim *deligatus non potest delegare*. May, Insurance §154; *International Trust Co. v. Norwich, etc., Ins. Co.* (1895), 71 Fed. 81, 86, 17 C. C. A. 608; *Hartford Fire Ins. Co. v. Josey* (1894), 6 Tex. Civ. App. 290, 25 S. W. 685; *Steele v. German Ins. Co., etc.* (1892), 93 Mich. 81, 84, 85, 53 N. W. 514, 18 L. R. A. 85; *Continental Ins. Co. v. Ruckman* (1889), 127 Ill. 364, 20 N. E. 77, 11 Am. St. 121; *Bodine v. Exchange Fire Ins. Co.* (1872), 51 N. Y. 117, 10 Am. Rep. 566; *Pollock v. German Fire Ins. Co.* (1901), 127 Mich. 460, 86 N. W. 1017; 22 Cyc 1432; *Cullinan v. Bowker* (1903), 40 Misc. Rep. 439, 82 N. Y. Supp. 707.

The case of the *International Trust Co. v. Norwich, etc., Ins. Co.*, *supra*, was one similar in principle to the instant case. The court said: "It does

2. not follow that, because a person is employed by an agent of an insurance company rather than by the company itself, none of such person's acts or representations are binding on the company. It is customary for agents having charge of important

agencies to employ persons to perform clerical and much other work in their office, and to assist them generally in the discharge of the various duties which such agents have to perform. The business of insurance could not well be transacted without such assistants, and all insurance companies are doubtless well aware of the practice of employing them. It results from this well-known business usage that acts done and information given by such subordinate employees in the line of their duty should be held binding upon the companies which they represent." In that case one Shepard was the confidential employe and book-keeper of the agency firm, and had been for some years serving apparently in the same capacity as Miss Wallace in the instant case. In response to appellee's inquiry as to what he should do in regard to the matter, after he had told her of his business, she was ready to assure him, and did assure him, that she could take a note of it, and that it would be just as good as if Presnall were in, and that she could notify him when he came in, and she took a piece of paper and made a note of it. This is such a common and accepted method of transacting business, particularly insurance business, that to question its validity would but beget a want of confidence in insurance business that the companies themselves could not afford to have exist. It not infrequently happens that insurance agencies are incorporated, or that their business is done through trust companies organized not only for that purpose, but for other purposes as well, and that such business is transacted altogether by the clerical force, the president, manager, or other responsible officers of such corporation being absent from the place of business much of the time. We

hold that the notice given by the appellee to Miss Wallace was notice to the agents, and through

3. them to the company, that the building at the time was being used as a storage house instead of a dwelling, and that it was thereafter to be so used. It has been held in this state that notice to the agent is binding upon the company, though not communicated to it. *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 99 N. E. 1011.

Appellant insists that the provision in the policy that, if the building should become vacant, unoccupied, or uninhabited, and so remain exceeding

4. a period of ten days without the written consent of the company on the policy, the same becomes null and void, is a condition that cannot be waived by the agent. But it has been held that such provisions are stipulations in favor of the company which it can waive by express agreement, or by its conduct, and such waiver can be by the promise, failure and conduct of the appellant's authorized agent, and that the appellant is thereby estopped to deny such waiver. *Continental Ins. Co. v. Bair* (1917), 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752. The

appellant having had notice of the purpose of

5. the appellee to change the use of the building so insured as aforesaid, it was then its duty to inform the appellee that it would not thereafter carry the risk, if it was its purpose not so to carry it, and, failing so to do, it cannot now escape its liability upon this ground. It knew the fact about the change of use and of its right to declare a forfeiture by reason thereof, and it failed to assert its right, and the law regards it as having waived the same. *York, Rec., v. Sun Ins. Co.* (1917), 66 Ind. App. 269, 113 N. E. 1021;

*Havens v. Home Ins. Co.* (1887), 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Home Ins. Co., etc. v. Marple* (1890), 1 Ind. App. 411, 27 N. E. 633. It does not appear by the policy that the company deemed the risk, when a building was used for storage purposes, greater than when it was used for a dwelling, as there seems to be no difference in the rate, the policy covering storage buildings as well as dwellings, so that the right of forfeiture seems to be technical rather than substantial. Claiming the right of forfeiture, it could have returned the unearned premium and elected to declare the policy forfeited, but, instead of doing this, it collected another premium after the notice aforesaid and before the fire. It could not wait until after the loss, and then claim exemption from the payment for such loss because of the forfeiture of conditions of the policy of which it had notice. *Phoenix Ins. Co., etc. v. Boyer* (1890), 1 Ind. App. 329, 336, 27 N. E. 628.

Appellant claims that the court erred in refusing to admit in evidence the appellant's exhibit No. 8, which was a letter written by appellee to appel-

6. lant company. This letter was written in negotiations for compromise, but contains the following statement: "Feeling that I also was in some sense to blame," which appellant contends was a statement of an independent fact not necessary to the negotiations in compromise. Even if this were error, such error was made harmless by the evidence of H. L. Cushwa, witness for the appellant, who testified to the same admission made by the appellee to him, and this admission is not denied by appellee. An error in excluding evidence is harmless where such evidence is admitted at another time or in another

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form. *Boxell v. Bright Nat. Bank* (1916), 184 Ind. 631, 112 N. E. 3; *American Maize Products Co. v. Widiger* (1917), 186 Ind. 227, 114 N. E. 457; *Koehler v. Harmon* (1913), 52 Ind. App. 315, 98 N. E. 1009; *Brinkman v. Pacholke* (1908), 41 Ind. App. 662, 84 N. E. 762.

We find no available error. Judgment is affirmed.

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**MACKEY V. LAFAYETTE LOAN AND TRUST COMPANY ET AL.**

[No. 9,690. Filed January 24, 1919. Rehearing denied April 24, 1919.]

1. **APPEAL.—Questions Retrievable.—Ruling on Demurrer.—Record.**—No question is presented for review as to the ruling on the demurrer to a paragraph of complaint, where the record contains only a copy of such paragraph made from the office copy of counsel in the case, and the record does not show that such substitution was authorized by the trial court under the provisions of §388 Burns 1914, §379 R. S. 1881. p. 61.
2. **MASTER AND SERVANT.—Injuries to Servant.—Dangerous Occupation Act.—Construction.—Scope.**—Section 4 of the Dangerous Occupation Act (Acts 1911 p. 597, §3862a *et seq.* Burns 1914), making it the duty of all owners, contractors and subcontractors engaged in the construction of any building to see that all scaffolding, appliances, etc., are carefully selected and tested for the safety of employes, applies only to the particular person in charge of the work, and does not take away the independent-contractor defense. p. 65.
3. **MASTER AND SERVANT.—Injuries to Servant.—Employee of Independent Contractor.—Liability for Injury.**—Where an employe of a subcontractor was injured by the falling of a defective scaffold, which had been constructed by a fellow servant and the foreman employed by the subcontractor, the injured employe could not recover against the owner and general contractor in an action based on §4 of the Dangerous Occupation Act (Acts 1911 p. 597, §3862a *et seq.* Burns 1914), where it affirmatively appeared from the complaint that plaintiff's employer was an independent contractor, and no facts were alleged showing that defendants were guilty of personal negligence causing the injury. p. 65.

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4. **PLEADING.**—*Complaint.*—*Allegations.*—*Conclusions of Law.*—In an action against the owner of a building and the general contractor in charge of its construction by an employe of a subcontractor, who was injured by the falling of a scaffold, allegations in the complaint that it was the duty of defendants to see that the material used in the construction of the scaffold was carefully selected and tested, and that the scaffolding was properly constructed, were mere conclusions of law, where no facts were stated from which the duty arose. p. 67.
5. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Independent Contractor.*—*Injury to Employes.*—*Liability.*—Mere knowledge that, in the construction of a building, a scaffold would be necessary and permission to build it, on the part of the owner and the general contractor, is not sufficient to make them liable for injuries sustained by an employe of an independent subcontractor injured by the fall of a scaffold erected by such subcontractor, in the absence of facts pleaded showing a duty on the part of the owner and the general contractor to inspect and test the material used, etc. p. 67.

From Tippecanoe Circuit Court; *Charles A. Burnett*, Judge *pro tem*.

Action by Charles Mackey against the Lafayette Loan and Trust Company and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

*Henley, Fenton & Joseph* and *Henry Abrams*, for appellant.

*Alfred C. Evans* and *Kumler & Gaylord*, for appellees.

NICHOLS, J.—This is an action for damages for personal injuries sustained by the appellant while engaged as a servant in the work of constructing a building owned and being built for appellee Lafayette Loan and Trust Company by the general contractor, appellee Alva E. Kemmer.

The appellant filed his complaint in two paragraphs making as defendants thereto Mesker Brothers and the Griffith Iron Works, and appellees Lafayette

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Loan and Trust Company and Alva E. Kemmer. Afterward the appellant filed a written dismissal as to defendants Mesker Brothers and the Griffith Iron Works.

The appellees each filed separate demurrers to each paragraph of the appellant's complaint, citing as cause that neither paragraph of the complaint states facts sufficient to constitute a cause of action. The trial court sustained each of the demurrers to each paragraph of the appellant's complaint. The appellant thereupon elected to stand upon his complaint and each paragraph thereof and the ruling of the court on the demurrers thereto.

Judgment was rendered for the appellees on said demurrer, and that the appellees have and recover from appellant their costs. From this judgment the appellant appeals.

The record presents no question as to the first paragraph of the complaint for the reason that such first paragraph is not in the record, but only "a

1. full, true and complete copy of the first paragraph of the complaint \* \* \* as the same appears from office copy of the counsel in the case." If such first paragraph was lost, the trial court might have authorized a copy thereof to be filed and used instead of the original; but such substitution must be in the trial court and by proper proceedings in accordance with the method given by the statute. §388 Burns 1914, §379 R. S. 1881; Elliott, App. Proc. §596; *Davis v. Talbot* (1897), 149 Ind. 80, 47 N. E. 829; *Ross v. Stockwell* (1897), 17 Ind. App. 77, 46 N. E. 360; *State, ex rel. v. McGill* (1895), 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016. As appears from the record, there was no order of substitution in this case.

It is averred in the second paragraph of the complaint, in substance, that the appellant was on September 1, 1914, in the employ of the defendant Griffith Iron Works, and engaged in the work of assisting in the erection of a certain building located in the city of Lafayette, Indiana; that appellee Lafayette Loan and Trust Company was the owner of and was causing said building to be erected on which appellant was at the time at work; that the Mesker Brothers Iron Works was a subcontractor engaged in the work on said building; that appellee Kemmer was a general contractor employed by the owner of said building to erect and complete the same, *and that the appellant was on said September 1, 1914, in the direct employ of the said defendant Griffith Iron Works*; that the said defendant Griffith Iron Works was a subcontractor in the employ of the defendant Mesker Brothers Iron Works, and that the said Mesker Brothers Iron Works was a subcontractor under the general contractor, the appellee Kemmer; that on said date the appellant and one Morris, while employed on the work of said building as aforesaid, were working between the second and third floors of the building on a scaffold which had been built by one Wittworth, a working man and an employe of the said defendant Griffith Iron Works, and by one Miller who was in charge of the work for the defendant Griffith Iron Works; that said appellee Kemmer, on August 18, 1913, entered into a written contract with appellee Lafayette Loan and Trust Company for the erection of said building, by virtue of which appellee Kemmer agreed to provide all the materials and perform all work for the complete erection of said building; that appellees knew at the time the contract



was entered into that it would be necessary for the prosecution of said work of erecting and constructing said building, and the various parts thereof, to build and erect, or cause to be built and erected, certain scaffolding upon and about which workmen and employes working and employed in the building and in the construction of said building would be compelled to work in the necessary prosecution of said work; that it was the duty of appellees to see that whatsoever material was used in the construction of any scaffolding was carefully selected, inspected and tested so as to exclude defects and dangerous conditions arising from the failure so to do, and to see that all such scaffolding was accurately constructed to bear all weight, and to meet the requirements for which it was being used, with safety to the persons required to use the same, and to inspect and know that any scaffold erected for the purpose of constructing the building should be a proper and safe one. That the appellees, disregarding their duty in that behalf, *permitted* scaffolding to be erected in a negligent and unsafe manner and of improper and unsafe materials; that the appellant had no part in the erection of such scaffolding and that he was told by the said Miller, the foreman as aforesaid, that said scaffolding was safe and secure. The defendants well knew that said scaffolding was unsafe, insufficient and unsecure, or might have known the same by exercising due care as imposed by law upon said defendants in this regard; that on said September 1, 1914, while engaged to assist in the construction of said building, he was ordered and directed by the foreman in charge of said work to go upon said scaffold, and while he was

standing upon the same, without any negligence on his part, but solely on account of the negligence and carelessness of said defendants in *permitting* said scaffold to be so negligently constructed as aforesaid, the scaffold broke and gave way, and the appellant fell a great distance to the ground below, by reason of which he was injured, for which he seeks damages.

The court is informed by appellant's brief that the second paragraph of complaint is expressly based upon the violation of the "Dangerous Occupation Act" of 1911, and that it is drawn upon that theory. (Acts 1911 p. 597, §3862a *et seq.* Burns 1914.) Section 4 of this act, being the section involved in this suit, provides as follows: "It is hereby made the duty of all owners, contractors, subcontractors, \* \* \* engaged in the \* \* \* construction \* \* \* of any building, \* \* \* to see and to require that all \* \* \* rope, \* \* \* appliances, \* \* \* contrivances \* \* \* are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions, and that all scaffolding, \* \* \* and all contrivances used, are amply, adequately and properly constructed \* \* \*; and, generally, it shall be the duty of all owners, \* \* \* contractor, subcontractor, and all other persons *having charge of, or responsible for any work, \* \* \* involving risk or danger to any employees, \* \* \* to use every device, care and precaution which it is practicable \* \* \* to use for the protection and safety of life, limb and health, \* \* \* without regard to additional cost, \* \* \* the first concern being safety to life, limb and health.*"

It will be noted that the provisions of this section

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apply only to owners, contractors and subcontractors *engaged* in the construction of any building,

2. and to the owners, contractors and subcontractors and all other persons *having charge of, or responsible for, any work involving risk or danger to employes*. The act has been construed by the Supreme Court of Indiana in the case of *Leet v. Block* (1914), 182 Ind. 271, 106 N. E. 373. From this decision we quote as follows: "Does the act of 1911 impose on the owner and contractor such duties of testing and inspecting as to deprive each of them of the independent contractor defense? We are of the opinion that the question must be answered in the negative. The act evinces no legislative intent to impose a duty of testing and inspecting appliances except on the particular owner, contractor, or subcontractor who has 'charge of' or is 'responsible for' the work, etc., in question. While the act does materially change the common-law duties of the employer and impose on him greater obligations in relation to the safety of employes, it was not the legislative purpose to make the owner liable for an injury occurring to an employe of a contractor or subcontractor because of the latter's negligence, in cases where the owner lets a contract for the particular work, without reserving any control over the manner of the work or the character of the appliances used."

Following this construction of the section in question, it is evident that unless the appellees had charge of, or were responsible for, that part of the

3. work, in the construction of said building in which the appellant was employed at the time of his injury, there was no duty incumbent upon them or either of them to inspect and know that the scaf-

fold in question was a proper and safe scaffold and on which the appellant might perform his work in safety.

Does it appear by the complaint that either of the appellees had charge of, or were in any way responsible for, that part of the work of construction in which the appellant was at the time of his injury employed? We think not. On the contrary, it is averred in the complaint that appellee Lafayette Loan and Trust Company was the owner, and as such had entered into a contract of construction with appellee Kemmer, and it does not appear by the contract that such owner reserved to itself any right or control over the manner in which the work should be prosecuted; nor is there any allegation in the complaint that the said owner did in any manner supervise the work of construction. Further, it is averred in the complaint that Mesker Brothers Company was a subcontractor of appellee Kemmer, and that the Griffith Iron Works was a subcontractor of Mesker Brothers Iron Company, and that the scaffold, the faulty construction of which caused appellant's injury, was constructed by one Wittworth, a working man, and by one Miller, foreman, both in the employ of the Griffith Iron Works. There is no averment in the complaint that either of the appellees in any manner directed or assumed charge of the work in which the Griffith Iron Works was engaged, or that either of the appellees directed as to the construction of the defective scaffold. It was the foreman of the Griffith Iron Works that told appellant that the scaffold was safe, and it was this same foreman, while in charge of said work, that ordered appellant to go upon it. From these facts, it affirmatively appears

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that the Griffith Iron Works was an independent contractor as to each and both of the appellees, for whose acts of negligence the appellees are not liable.

In order to make appellees liable to appellant, there must have been some act or acts of personal negligence on their part, as a result of which appel-

4. lant received his injuries. We find no such averment in the complaint. It is averred in the complaint that it was the duty of appellees to see that whatsoever material that was used in the construction of any scaffolding was carefully selected, inspected and tested, so as to exclude defects and dangerous conditions arising from a failure so to do, and to see that such scaffolding was amply, adequately and properly constructed; but there are no facts stated from which such duty arose, and therefore the averment becomes a mere conclusion of law, and without force. 12 Ency. Pl. and Pr. 1044. It is averred in the complaint that appellees *knew*

5. that in the construction of the building it would be necessary to erect scaffolding, and that they *permitted* the defective scaffold to be erected in a negligent and unsafe manner, and of unsafe and improper materials. But mere knowledge and permission are not sufficient to make the appellees liable, unless it further appears from the facts pleaded that they owed a duty to appellant to inspect and test the material used, and to direct the manner of constructing the scaffold, and no such facts are pleaded. *Maenner v. Carroll* (1876), 46 Md. 193.

The ruling of the trial court in sustaining of demurrers to the second paragraph of the complaint was not error.

Judgment affirmed.

## VALDENAIRE ET AL. v. HENRY ET AL.

[No. 9,695. Filed January 24, 1919. Rehearing denied April 24, 1919.]

1. **PLEADING.—Complaint.—Failure to Demur.—Waiver of Defects.—Statute.**—Under §348 Burns 1914, Acts 1911 p. 415, all objections to the sufficiency of a complaint are waived by the failure to demur thereto. p. 70.
2. **APPEAL.—Review.—Complaint.—Omission of Material Averments.—Presumptions.**—The court on appeal will assume that any omission of a material averment of the complaint was cured by the evidence. p. 70.
3. **FRAUD.—Action.—Exchange of Lands.—Fraudulent Representations.—Measure of Damages.**—In an action for damages for alleged false and fraudulent representations as to the character and value of land conveyed to plaintiffs by defendants in exchange for other land, the measure of damages is the difference between the actual value of the property deeded to plaintiffs at the time of the exchange, and what it would have been worth had it been as represented, and in such action the value of the land conveyed by plaintiffs is immaterial. p. 71.
4. **FRAUD.—Representations of Value.—Effect.**—In an action to recover damages for fraud, where plaintiffs were induced by defendants' representations to exchange their real estate for lands located in southern California, upon which defendants lived and had special knowledge of its character and value, and concerning which facts defendants knew plaintiffs, who were residents of Indiana and had never been in California, to be wholly ignorant, plaintiffs were justified in relying on defendants' representations without making inquiry as to their truthfulness. p. 72.
5. **FRAUD.—Reliance on Fraudulent Representations.**—Where defendants induced plaintiffs, who had never been in California, to exchange their lands for lands located in that state, and plaintiffs' inquiries of a nephew in California did not elicit information disclosing the falsity of defendants' representations, defendants are not in position to complain that plaintiffs were negligent in relying upon their representations without further inquiry. p. 73.
6. **FRAUD.—Exchange of Lands.—Action.—Defenses.**—In an action for damages for false representations as to the character of land exchanged by defendants for land belonging to plaintiffs, where plaintiffs proceeded to a city within two hours' ride of defendants' land and could easily have inspected the property, but,

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because of the insistence of the husband of one of the defendants that the transaction be closed immediately to enable him to keep an urgent engagement in another city, plaintiffs were induced to telegraph to release the deed to their land, which they had deposited in escrow before leaving home, without inspecting defendants' property, they had a right to rely on defendants' representations. p. 73.

7. **FRAUD.—Action.—False Representations.—Damages.—Right to Recover.**—Where plaintiffs, after executing a contract of sale and placing in escrow deeds to their land, journeyed to a distant state to take charge of the property, which was to be conveyed to them by defendants, a subsequent performance by plaintiffs, even with full knowledge of the fraud which had been practiced on them, would not bar them of a right to recover damages for fraudulent representations as to the land plaintiffs were to receive. p. 74.

From Marion Superior Court (100,294); *W. W. Thornton*, Judge.

Action by James R. Henry and another against Caroline C. Valdenaire and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed*.

*David A. Meyers*, for appellants.

*William N. Harding* and *Alfred R. Hovey*, for appellees.

**NICHOLS, J.**—This was an action by the appellees against the appellants to recover damages for alleged false and fraudulent representations made by the appellants to the appellees as to the character and value of certain California land conveyed to appellees by appellants in exchange for real estate located in the States of Indiana and Illinois.

The complaint was in one paragraph to which, without demurring thereto, the appellants answered by general denial. Upon the issues thus joined the cause was submitted to the court, without the intervention of a jury, for trial. Judgment was rendered for the

appellees in the sum of \$2,720 and costs. After judgment, the appellants filed a motion for a new trial, which was overruled, to which ruling the appellants excepted, and prayed an appeal, which was granted.

The errors assigned, and relied upon for reversal, are: “(1) The appellees’ complaint filed in the trial court on its face fails to state a cause of action against the appellants, for the reason that said complaint fails to allege the value of the real estate conveyed to appellants by the appellees in the exchange of property as set forth in said complaint. There are no allegations in the complaint from which the measure of damages could be ascertained. The complaint fails to allege that the appellees parted with anything of value for the California land conveyed to them by the appellants, and hence said complaint contains no allegations which would warrant the trial court to assess damages for false and fraudulent representations.”

As to this assignment of error, we need only to say that, under §348 Burns 1914, as amended in 1911,

Acts 1911 p. 415, all objections to the sufficiency

1. of the complaint are waived, if the complaint is not demurred to in the trial court. *Vorhees v. Cragun* (1916), 61 Ind. App. 690, 112 N. E.
2. 826; *Fox v. Close* (1916), 63 Ind. App. 66, 113 N. E. 1007; *Haehnel v. Seidentopf* (1916), 63 Ind. App. 218, 114 N. E. 422; *Milhollin v. Adams* (1918), 66 Ind. App. 376, 115 N. E. 803; *Aufderheide, Trustee, v. Heward* (1917), 65 Ind. App. 286, 117 N. E. 212; *Riley v. First Trust Co., Admr.* (1917), 65 Ind. App. 577, 117 N. E. 675; *Sowerwine v. Noblesville, etc., Power Co.* (1917), 66 Ind. App. 292, 118 N. E. 146. And the court will assume that any omission of a material averment of the complaint was cured by the evidence. *Fox v. Close, supra.*



“(2) The court erred in overruling the motion for new trial as filed by the appellants.”

Under this assignment of error, the appellants complain that during the trial the court erred in refusing to permit appellants, for the purpose

3. of establishing the measure of damages, if any, that were due appellees, to show the value of the real estate conveyed by appellees to appellants in exchange for the conveyance of the California farm, or ranch, alleged fraudulent representations as to the value of which is the basis of this action. While there are some cases that seem to support appellants' contention (see 20 Cyc 130-132, and cases cited; 14 Am. and Eng. Ency. Law 182, and cases cited), certainly, the great weight of authority, in Indiana, as well as elsewhere, makes the measure of damages not the difference in value between the properties exchanged, but the difference between the actual value of the property deeded by appellants to appellees, at the time of exchange, and what it would have been worth had it been as represented, or what its value was represented to be. In support of their contention, appellants cite *Johnson, Admr., v. Culver, Admr.* (1888), 116 Ind. 278, 19 N. E. 129, but we think that a fair construction of this case on this question does not help them. The measure of damages, in so far as it involved the question in this case, was not considered, and the method of proof, so far as the case discloses, seems to have been conceded by both parties, and adopted by the court without objection. The construction that the appellants would have us give the case is not in harmony with other decisions in this state. *Nysegander v. Lowman* (1890), 124 Ind. 584, 24 N. E. 355; *Brier v. Mankey* (1911), 47 Ind. App. 7,

93 N. E. 672; *Smith v. Hunt* (1912), 50 Ind. App. 592, 98 N. E. 841. We quote from page 602 of the last case cited as follows: "The measure of damages in such a case is the difference between the value of the goods as they actually were, and their value had they been as represented. The measure of damages is not the difference between the value of the goods and the consideration exchanged for them."

The appellants state that: "Under the law it became the duty of the appellees to investigate the truthfulness of any misrepresentations which may have been made with reference to the California land."

As applied to the facts in this case, we do not think that the foregoing correctly states the principle. The appellees were residents of the city of Indian-

4. apolis, Indiana, at the time the contract of sale was signed, and had never been in southern California, where the land involved was located. Appellant Julia A. Leftwich, who was the daughter of appellant Valdenaire, together with her husband, had lived upon the land, and had full and special knowledge of its character and value, and with this knowledge, and knowing that the appellees were wholly ignorant of the facts, the appellants, as appears by the evidence, made the fraudulent representations that are the basis for damages in this action. Under these circumstances, the appellees were not required, before making the contract of exchange, or before the final consummation of the deal, to make inquiry as to the truth or falsity of the representations. They were justified in relying upon them. *Rohrof v. Schulte* (1900), 154 Ind. 183, 192, 55 N. E. 427; *Kramer v. Williamson* (1893), 135 Ind. 655, 660, 35 N. E. 388; *Robin-*

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*son v. Reinhart* (1894), 137 Ind. 674, 36 N. E. 519; *Cully v. Jones* (1905), 164 Ind. 168, 73 N. E. 94; *Beck v. Goar* (1913), 180 Ind. 81, 100 N. E. 1; *Manley v. Felty* (1896), 146 Ind. 194, 45 N. E. 74; *Judy v. Jester* (1913), 53 Ind. App. 74, 87, 100 N. E. 15; *New v. Jackson* (1912), 50 Ind. App. 120, 95 N. E. 328; *Mead v. Bunn* (1865), 32 N. Y. 275. It is disclosed by

5. the evidence that appellees wrote to a nephew who lived in southern California for information concerning the land, and that the nephew wrote two letters to appellees. These letters were lost or destroyed, and their contents are not before us further than they seemed to contain no information upon which appellees could determine whether appellants' representations were true or false, and it appears by the evidence that the appellees continued to rely upon the representations made to them by appellants. It seems to us that appellants are not in position to complain that appellees were negligent in not making further inquiry, and in relying upon the representations made by appellants. *Rohrof v. Schulte, supra*; *Beck v. Goar, supra*.

After the execution of the contract of sale, appellees executed deeds for the properties being exchanged for the California lands, placed them

6. with attorneys in Indianapolis, and left for San Diego, with the arrangement that these deeds were to be delivered to appellants as soon as appellees telegraphed such attorneys that a deed for the California land, duly executed, had been delivered to them in San Diego. Appellants say that Mr. Henry was then within two hours' ride of the land, and could have easily made inspection of the farm himself. But it is disclosed by the evidence that when Mr. Henry

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arrived in San Diego, his wife, who was with him, was sick, and that they were among strangers, and that he could not at the time leave her. Witness Davis, who was the real estate agent of the appellants, testified that he instructed them to get possession of the Henry deeds, before they saw the ranch. Appellant Leftwich's husband met the appellees at the train, on their arrival at San Diego, and hurried the final consummation of the deal, and insisted upon sending the telegram to release the deeds, saying that he was there at much expense, and that he wanted to close the transaction and leave, and that he had an engagement that he must meet. Under this stress of importunity, the telegram to release the deeds was sent before appellees inspected the land. Under these circumstances, appellees still had a right to rely upon the representations made by appellants.

Further, appellees, after executing the contract of sale and after placing the deeds in escrow, evidently journeyed to California to take charge of the

7. ranch, and a subsequent performance by them, even with full knowledge of the fraud that had been practiced on them, would not bar them of a right of recovery in damages. Certainly not, when, as the evidence shows, they did not have full knowledge. *Parker v. Marquis* (1876), 64 Mo. 38; *Johnson, Admr., v. Culver, Admr., supra*; *English v. Arbuckle* (1890), 125 Ind. 77, 25 N. E. 142; *Nysegander v. Lowman, supra*; *St. John v. Hendrickson* (1882), 81 Ind. 350.

There is no error in the record. Judgment affirmed.

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Equitable Surety Co., etc. v. Ind. Fuel Supply Co.—70 Ind. App. 75.

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EQUITABLE SURETY COMPANY OF ST. LOUIS ET AL. v.  
INDIANA FUEL SUPPLY COMPANY.

[No. 9,815. Filed April 25, 1919.]

**HIGHWAYS.—Construction.—Contractor's Bond.—Recovery on by Materialman.—Statutes.**—A materialman may recover on a public contractor's bond without first having complied with §§5901a-5901b Burns 1914, Acts 1911 p. 437, requiring materialmen to file claims with agents of the county within thirty days after the materials are furnished, since such act expressly declares that it shall not be construed as conflicting with any other laws for the protection of materialmen, but as supplemental thereto.

From Shelby Circuit Court; *Alonzo Blair*, Judge.

Action by the Indiana Fuel Supply Company against the Equitable Surety Company of St. Louis and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Major A. Downing*, for appellants.

*Quincy A. Meyers, Edward E. Gates and Samuel M. Ralston*, for appellee.

**ENLOE, J.**—Action by appellee, as relator, upon two bonds, executed by one Denny J. Bush, as principal, and appellant Equitable Surety Company of St. Louis, Mo., as surety thereon, to secure the due performance by said Bush of his contract for the making of certain improvements in a public highway, in Marion county, Indiana.

The cause was tried upon two paragraphs of amended complaint, to each of which a demurrer for want of facts was interposed and overruled.

The only alleged error we are called upon to consider, upon the record before us, is the action of the

trial court in overruling the demurrers to the amended paragraphs of complaint.

A consideration of the alleged error necessitates a construction of Acts 1911 p. 437, §§5901a, 5901b Burns 1914.

The issue between the parties to this appeal is clear cut; the appellant insisting that, before suit can be maintained on the bond, the materialman (appellee in this case was such) must have filed his claim therefor with the "agents of the county" within thirty days from the time such materials were furnished, as a prerequisite to his right of suit. Appellees, on the other hand, insist that the remedy given by the act in question is cumulative; that the materialman has a choice of remedies; that he may, if he desires, so file his claim with the agents of the county, and obtain his money directly from such source, and without the expense and delay of litigation, or he may, in case his claim is not paid, have his action on the bond.

The third section of the act in question provides: "This act shall not be construed as conflicting with any other laws for the protection of labor, sub-contractors or materialmen, but is supplemental thereto."

This statute was designed to further protect the parties named therein, as it expressly declares. The construction thereof contended for by the appellant would deprive these persons of rights they theretofore had, and make any right they sought to enforce dependent upon the doing by claimant of a preliminary act—filing his claim within thirty days, etc. Such a construction would turn the act in question in one for the protection of bondsmen on contractors' bonds, by having the effect of limiting the liability, and

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would in no way give additional protection to those who are, by its express terms, made within its provisions. *Illinois Surety Co. v. State, ex rel.* (1918), ante 450, 122 N. E. 30.

The evidence is not in the record, and no other assigned error is available.

The judgment is therefore affirmed.

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BOYD ET AL. v. GREER ET AL.

[No. 9,762. Filed April 25, 1919.]

1. **APPEAL.—Parties.**—Where the only issue against one party to the trial was tendered by plaintiff in his complaint and there was a separate judgment in favor of such party from which no appeal was taken, and he was not a party to the judgment appealed from, such party would not be affected by the result of the appeal, and is not a necessary party thereto. p. 80.
2. **EVIDENCE.—Vendor's Lien.—Exchange of Land and Chattels in Gross.—Value of Each.—Extrinsic Evidence.**—When called upon to enforce an alleged vendor's lien arising out of a sale or exchange of land and chattels in gross, a court of equity may hear extrinsic evidence as to the value placed on each by the parties to the transaction. p. 81.
3. **VENDOR AND PURCHASER.—Exchange of Land and Chattels in Gross.—Right to Vendor's Lien.**—Where land and chattels are sold or exchanged in gross, but the parties in making such sale or exchange have placed separate values on each, the court will enforce a vendor's lien against the land for the balance due thereon, although the obligation taken may include the price of both. p. 82.
4. **PAYMENT.—Vendor and Purchaser.—Vendor's Lien.—Mode and Application of Payments.**—The sale of land may take the form of an exchange when the buyer pays a part or all of the purchase price in other lands, and, in the absence of fraud, such payment has the same legal effect, as regards the right of the court to determine its application, as if the agreed value of the land purchased had been paid in money. p. 83.
5. **PAYMENT.—Distinct Accounts.—Part Payments.—Application.**—Where one person is indebted to another upon several distinct

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accounts, he has a right to direct the application of his payments, but if the debtor pays generally the creditor may apply as he elects, and, if neither makes a specific application, the court will make such application of payments as justice between the parties most urgently demands. p. 83.

6. **PAYMENT.—Exchange of Real and Personal Property.—Part Payments.—Application.—Vendor's Lien.**—In an action to enforce a vendor's lien for the amount of a note given by defendant for the balance of the purchase price on the sale in gross of a farm and certain personalty, the court, in the absence of direction by the parties, would be authorized to apply the value of land conveyed in part payment by defendants, first to any amount agreed on by the parties as to the value of the personal property, and the remainder, if any, on the price of the farm land, and where such an application fully discharged the debt owing for the personalty, so that the entire amount of the notes in suit constituted an unpaid balance on the purchase price of the farm, plaintiff was entitled to a decree establishing a vendor's lien in his favor. p. 84.

7. **VENDOR AND PURCHASER.—Remedies of Vendor.—Lien.—Waiver.—Taking Note.**—Acceptance of a vendee's notes for the unpaid portion of the purchase price of land did not deprive the vendor of his right to a vendor's lien. p. 85.

From Jackson Circuit Court; *Oren O. Swails*, Judge.

Action by Ford W. Greer against William G. Boyd, Mattie L. Boyd and another. From the judgment rendered, the defendants named appeal. *Affirmed.*

*Bingham & Bingham*, for appellants.

*Floyd A. Sterrett, Kochenour & Prince* and *Wilbur T. Gruber*, for appellees.

**BATMAN, P. J.**—This is an action by appellee Ford W. Greer against appellants to recover a judgment on two promissory notes, and to have such judgment decreed to be a lien on certain real estate alleged to have been sold and conveyed to them by said appellee. The appellee Hiram Brown was made a defendant to said action to answer as to his interest in said



real estate by reason of a certain mortgage thereon, executed to him by appellants since they became the owners thereof. Issues were duly joined on the complaint by appellants, who also filed a cross-complaint against appellee Greer, in which they set up the breach of a contract, alleged to have been entered into between them and said appellee, and by reason of which they asked damages. Issues on said cross-complaint were duly joined by appellee Greer. Appellee Hiram Brown filed an answer to the complaint of said Ford W. Greer in two paragraphs, the first of which was a general denial. The second alleged in substance that appellants had theretofore executed to him a mortgage on the real estate described in the complaint, which had been duly recorded in the proper mortgage record of said county; that he had taken and accepted the same in good faith, for a valuable consideration then and there given in the regular course of business, without any notice, actual or constructive, of the claim or lien of said appellee Greer, as set forth in his complaint. To this affirmative paragraph of answer appellee Greer filed a reply in general denial. The cause was submitted to the court for trial, and a judgment was rendered in favor of said Hiram Brown against appellee Greer that said Greer take nothing by his complaint against Brown, and that Brown recover of and from Greer all his costs and charges laid out and expended. A judgment was also rendered in favor of appellee Greer against appellants that they take nothing by their said cross-complaint, and that Greer recover of appellants all his costs and charges laid out and expended on the issues tendered by the cross-complaint. A judgment was also rendered in favor of appellee Greer against

appellant William G. Boyd for the sum of \$310.46 and costs, which amount was adjudged to be a vendor's lien upon the real estate described in said appellee's complaint, and a decree was entered foreclosing the same. A further judgment was rendered in favor of appellee Greer against appellant William G. Boyd for the sum of \$17.50 and costs. Appellants filed a motion for a new trial, which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

The transcript on appeal was filed in this court on September 16, 1916. On December 29, 1916, appellee

Greer filed a motion to dismiss the appeal on

1. the ground that this is a vacation appeal; that

Hiram Brown is a necessary party thereto; that no effective steps had been taken to give him notice thereof; that said Brown had not entered his appearance thereto or joined in error; that more than ninety days had expired since the filing of the transcript, and that the time allowed by law for taking an appeal had also expired. This motion was postponed until final hearing, and is now before us for determination. This is a vacation appeal. It will be observed that on the trial the only issue to which the said Hiram Brown was a party was one tendered by appellee Greer in his complaint, and on which there was a separate judgment in favor of said Brown, from which no appeal was taken. The judgment which forms the basis of this appeal is one rendered against appellants in favor of appellee Greer, and to which said Brown is not a party. Under these circumstances Brown would not be affected by the result of this appeal, and is not a necessary party thereto. *Rooker v. Fidelity Trust Co.* (1916), 185 Ind. 172, 109

N. E. 766. The motion of appellee Greer to dismiss the appeal is therefore overruled.

Appellants contend that the decision of the court is not sustained by sufficient evidence and is contrary to law. In support of this contention they assert that the evidence shows, among other things, that on August 31, 1914, appellant William G. Boyd and appellee Greer entered into a plain and unambiguous contract, by the terms of which the latter agreed to exchange a farm and certain personal property in gross for certain real estate owned by appellants; that in pursuance to said contract the exchange of property was made, and appellant William G. Boyd executed to said appellee his promissory note for \$300, as a part of the agreed consideration for said exchange; and that the notes in suit, except as to a small amount, were given in renewal of said note. Appellants contend that under these facts appellee was not entitled to a decree, establishing a vendor's lien in his favor on the farm which they obtained from him through said exchange. In making this contention they rely on the general rule that on a sale of land and personal property for a gross sum, without any separation of their values, so that the consideration for which the land was sold may be determined, no lien can be enforced on the land for the debt thereby created. They assert that since the contract in question is plain and unambiguous, and shows that the farm and personal property in question were traded to them in gross, it cannot be varied by oral or extrinsic evidence, and hence no portion of said indebtedness should have been decreed to be a lien on their said farm. We cannot agree

2. with appellants that a court of equity, when called upon to enforce an alleged vendor's lien,

arising out of a sale or exchange of land and chattels in gross, may not hear extrinsic evidence as to the value placed on each by the parties to such sale or exchange. *Gerstell v. Shirk* (1913), 210 Fed. 223, 127 C. C. A. 41. In accord with this decision and the better reason, the contrary is evidently true. In the instant case there is evidence which tends to prove that the value placed on the personal property by the parties in the exchange of property was \$100, and other evidence which tends to prove that such value was placed at \$300. This afforded the court some evidence from which it could determine the separate values placed on the land and personal property by the parties in making the exchange. Under these circumstances the rule which appellants seek to invoke

is not applicable. In reaching its decision the

3. trial court evidently recognized and applied the rule that, where land and chattels are sold or exchanged in gross, but the parties in making such sale or exchange have placed separate values on each, the court will enforce a vendor's lien against the land for the balance due thereon, although the obligation taken may include the price of both. 39 Cyc 1830; 29 Am. and Eng. Ency. Law 745; *McCauley v. Holtz* (1878), 62 Ind. 205; *Gerstell v. Shirk, supra*; *Bergman v. Blackwell* (1893), (Tex. Civ. App.) 23 S. W. 243; *Russell v. McCormick* (1871), 45 Ala. 587, 6 Am. Rep. 707. Under the evidence cited and rule stated, we cannot say that the decision of the court with reference to the vendor's lien decreed is not sustained by sufficient evidence or is contrary to law.

But appellants contend that in any event the amount decreed to be a lien against their land was too large. They base this contention on the fact that,

inasmuch as appellee Greer testified that the parties, at the time of the exchange, placed a value of \$100 on the personal property, the court, in determining the amount of the lien, should have deducted said sum, at least, from the balance found due appellee on account of said exchange of property. In making this contention appellants evidently assume that no part of the value of the real estate which they conveyed to said appellee was applied, or ought to be applied, in payment of the amount which the evidence tends to prove the parties placed on the personal property, as its value, at the time of the sale or exchange. This assumption is unwarranted.

4. The sale of land may take the form of an exchange. This occurs when the buyer pays a part or all of the purchase price in other lands. When this is done in the absence of fraud, it has the same legal effect as if the agreed value thereof had been paid in money. 39 Cyc 1801; *Hare v. Van Deusen* (1860), 32 Barb. (N. Y.) 92. As there is no question of fraud in the instant case, we may treat the conveyance of the real estate made by appellants to appellee Greer as the payment of its value in money, and determine its proper application accordingly. It

5. was held in the case of *McCauley v. Holtz*, *supra*, that where real and personal property is sold in gross, but the parties at the time of the sale make an estimate of the value of each, and payments are subsequently made on an unpaid balance of the purchase price, without any direction as to its application, and there is no evidence as to any specific application thereof by the vendor, the court will apply such payments to the debt owing for the personal property, under the recognized rule that, where one

person is indebted to another upon several distinct accounts, he has a right to direct his payments to be applied to any one, as he chooses; but if he pays generally the creditor may apply as he elects, and, if neither makes a specific application, the court will usually apply the payments, first to the debt having the most precarious security, or no security, or to the oldest debt. *King v. Andrews* (1868), 30 Ind. 429.

In other words, the law, in the latter class of

6. cases, will make such application of the payments as justice between the parties most urgently demands. The only evidence which we have been able to discover that can be said to bear on the application of the payment made by appellants in the conveyance of their real estate to appellee Greer is from appellant William G. Boyd and said appellee. The former testified that the original note for \$300 was given for the personal property, while the latter testified that said note was given as evidence of the amount due on the farm. This does not afford direct evidence as to how such application was made, but furnishes a basis for opposing inferences in that regard. Under such circumstances it became a question for the court as to what application of such payments, if any, was made. It is found that no application thereof was in fact made, but that such payment was made generally by appellants, and held by such appellee, without specific application, then under the rule stated *supra*, the court was authorized to apply the same, first to any amount which he may have found was agreed upon by the parties as the value of the personal property, and the remainder on the price of the farm. Since the evidence shows that the value of the real estate so conveyed was far in excess of the

value of the personal property, such application would have fully discharged any amount due therefor, and left the entire amount of the notes in suit as an unpaid balance on the farm.

Appellants assert that the notes in suit are governed by the law merchant; that the giving of such notes, in the absence of an agreement to the

7. contrary, is payment; and that by reason of such fact appellee is not entitled to a vendor's lien on their land. For the reason stated in the case of *Essig v. Porter* (1916), 63 Ind. App. 318, 112 N. E. 1005, this contention is not well taken.

We fail to find any sufficient ground on which to hold that the court erred in overruling appellant's motion for a new trial. The judgment, therefore, is affirmed.

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VANDALIA RAILROAD COMPANY v. FRY.

[No. 9,755. Filed April 25, 1919.]

1. **TRIAL.—Instructions.—Directing Verdict.**—Refusal of a requested instruction directing a verdict for defendant is proper, where there is some evidence to sustain every element essential to plaintiff's right of recovery. p. 88.
2. **APPEAL.—Review.—Refusal of Instructions.**—It was not error for the court to refuse requested instructions which, in so far as correct, were substantially covered by instructions given by the court on its own motion. p. 88.
3. **TRIAL.—Instructions.—Cur of Omissions.**—In an action for personal injuries, the giving of an instruction failing to inform the jury as to certain facts bearing on plaintiff's contributory negligence was not error, where the jury was fully instructed on that issue by other instructions given. p. 88.
4. **NEGLIGENCE.—Contributory Negligence.**—The negligence of an injured party, to defeat his right of recovery, must be a proximate and not a remote cause of the injury, though it is not neces-

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- sary that such negligence shall have been the sole cause, but it is sufficient if it forms part of the efficient cause thereof. p. 89.
5. **APPEAL.—Review.—Instructions.—Consideration as a Whole.**—In order to determine whether instructions are misleading, they must be considered as a whole, and not in detached portions. p. 89.
  6. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Negligence of Fellow Servant.**—Under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914) the failure of a fellow servant to exercise reasonable care is deemed to be a breach of duty on the part of the master. p. 90.
  7. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Use of Defective Equipment.**—Under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-2080k Burns 1914), the mere fact that an injured servant uses defective equipment, accompanied by apparent danger in some degree, is not conclusive on the question of contributory negligence, as the conditions may be such that reasonable minds might differ as to the feasibility of safely encountering such danger, or such that any person of reasonable prudence might believe that it could be safely encountered. p. 90.
  8. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Defective Equipment.—Contributory Negligence.—Jury Questions.**—In an action under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), whether the injured servant was guilty of contributory negligence in using certain equipment, claimed to be openly and obviously defective, held in view of the evidence to be a question for the jury. p. 91.
  9. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Negligence of Fellow Servant.—Transitory Danger.**—Under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), the master is chargeable with the negligence of a servant in the discharge of a duty owing to his master, which creates a transitory danger resulting in an injury to a fellow servant. p. 92.
  10. **APPEAL.—Briefs.—Waiver of Error.**—Causes for new trial to which appellant fails to make any specific reference in its propositions or points, as required by the rules governing the preparation of briefs, are waived. p. 93.

From Greene Circuit Court; *Theodore E. Slinkard*, Judge.

Action by Lewis M. Fry against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*



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*Samuel O. Pickens, Owen Pickens, R. F. Davidson, Charles W. Moores, D. P. Williams and W. V. Moffett,* for appellant.

*Jesse F. Wiseman and Davis, Bogart, Royse & Moore,* for appellee.

BATMAN, P. J.—This is an action by appellee against appellant to recover damages for personal injuries alleged to have been received by reason of the negligence of a fellow servant while in the employ of appellant. The complaint is in a single paragraph, and alleges, among other things, that on April 15, 1914, appellant was a corporation engaged in the business of trade and commerce within the State of Indiana, and was employing in its said business at said time five or more persons; that on said date, appellee was injured while in the employ of appellant in its said business by the negligence of one William Brashear, who was also an employe of appellant and a fellow servant of appellee at said time; that at the time appellee received his alleged injuries he and the said Brashear were engaged in placing a drawbar in one of appellant's cars; that in performing said work it was customary and necessary for certain bolts, known as carrying arm bolts, to be driven through certain timbers on the end of the car in such manner as to hold the chain, used in moving or swinging said drawbar into its proper place, and to prevent said chain from slipping or rolling over the bolts; that on the occasion in question the said Brashear drove the bolts through said timbers on the end of the car for such purpose, and then placed the chain over said bolts and fastened the same around said drawbar while appellee raised and held one end of the same; that appellee then undertook to swing

or push said drawbar around and into its proper place, when it fell and injured his foot, by reason of the carelessness and negligence of said Brashear in failing and refusing to drive the bolts through said timbers in such manner as to prevent said chain from slipping over the same. Issues were duly joined on the complaint, after which the cause was submitted to a jury for trial, resulting in a verdict and judgment in favor of appellee. Appellant filed a motion for a new trial which was overruled, and has assigned this action of the court as the sole error on which it relies for reversal.

Appellant complains of the action of the court in refusing to give certain instructions requested by it.

Instruction No. 1 so requested, if given, would

1. have directed the jury to return a verdict in favor of appellant. As there is some evidence to sustain every element essential to appellee's right of recovery, it would have been error to give said instruction. *Vandalia R. Co. v. Parker* (1916), 61 Ind. App. 146, 111 N. E. 637. As to the remaining instructions requested by appellant, we find that in so far as they state the law correctly they are

2. substantially covered by instructions given by the court on its own motion. Therefore the court did not err in refusing to give the same. *Chicago, etc., R. Co. v. Mitchell* (1916), 184 Ind. 383, 110 N. E. 215.

Appellant contends that the court erred in giving instruction No. 5 on its own motion. It bases this contention on the fact that said instruction omits

3. to inform the jury as to certain facts bearing on appellee's contributory negligence. This contention is not well taken as the jury was fully in-

structed in that regard by other instructions given. Under these circumstances there was no error in giving said instruction. *Home Tel. Co. v. Weir* (1913), 53 Ind. App. 466, 101 N. E. 1020.

Appellant predicates error on the action of the court in giving instructions Nos. 6 and 9 on its own motion. It claims that each of these instruc-

4. tions is erroneous, because they placed on appellant the burden of proving that appellee's negligence was the proximate cause of his injury, while the rule is that there can be no recovery in an action based on negligence if the negligence of the complaining party contributed in any way thereto. It is well settled that, in order for the negligence of an injured party to defeat his right of recovery, such negligence must be a proximate and not a remote cause of the injury. It is not necessary that it shall have been the sole cause, but it is sufficient if it enters into and forms part of the efficient cause thereof. 20 R. C. L. 136; 29 Cyc 526; *Indiana Stone Co. v. Stewart* (1893), 7 Ind. App. 563, 34 N. E. 1019; *Indianapolis Traction, etc., Co. v. Kidd* (1906), 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas.

942. In order to determine whether the jury

5. could have been misled by either of said instructions with reference to the effect of any negligence of appellee, which may have been only a concurring proximate cause of the injury, we must consider the instructions as a whole, and not in detached portions. *Cullman v. Terre Haute, etc., Traction Co.* (1915), 60 Ind. App. 187, 109 N. E. 52. We observe that the jury was informed by another instruction given by the court on its own motion, that contributory negligence on the part of appellee which

caused, or *partly* caused, his injuries, was a complete defense to the action. In view of this fact, it is apparent that the jury could not have been misled by the language used in either of said instructions, and hence there was no reversible error in giving the same.

Appellant finally contends that the verdict is not sustained by sufficient evidence and is contrary to law. It urges, among other things, that the

6. evidence fails to show that it was guilty of the acts, or either of the acts, of negligence, charged in the complaint. One of the acts of negligence charged in the complaint is that appellant's servant, Brashear, who was a fellow servant of appellee, carelessly and negligently failed and refused to drive the carrying arm bolts through certain timbers of the car, in such manner as to prevent the chain, used in placing the drawbar in position, from slipping over said bolts, and thereby allowing the drawbar to fall and injure appellee. As this is an action under the Employers' Liability Act, Acts 1911 p. 145, §§8020a-8020k Burns 1914, the failure of appellee's fellow servant, Brashear, to exercise reasonable care for appellee's safety, is deemed to be a breach of duty on the part of appellant. *J. Wooley Coal Co. v. Tevault* (1918), 187 Ind. 171, 118 N. E. 921, 119 N. E. 485. There is some evidence tending to sustain this charge of negligence, which is sufficient in that regard.

It is further contended that the evidence shows that appellee's negligence materially and proximately contributed to his injury. This contention is based

7. on the fact that the condition of the carrying arm bolts holding the chain was open and obvious to appellee. Admitting, without deciding, that

the condition of such carrying arm bolts was so open and obvious that appellee in the exercise of ordinary care for his own safety under the circumstances disclosed by the evidence ought to have observed the same, it does not necessarily follow that appellee was guilty of contributory negligence in proceeding with his work as he did. This court has held in a comparatively recent case, prosecuted under the Employers' Liability Act of 1911, *supra*, that the mere fact that an injured servant uses defective equipment, accompanied by an apparent danger in some degree, is not conclusive on the question of contributory negligence, as the conditions may be such that reasonable minds might differ as to the feasibility of safely encountering such danger, or such that any person of reasonable prudence might believe that it could be safely encountered. *Standard Steel Car Co. v. Martinecz* (1916), 66 Ind. App. 672, 113 N. E. 244, 114

8. N. E. 94. In the instant case there is evidence which tends to prove that the carrying arm bolt which appellee drove through the car timber extended above the same six or seven inches; that the carrying arm bolt which the said Brashear drove through the car timber extended above the same about an inch and a half; that the chain placed over said bolts and under the drawbar was composed of links about an inch long, and a little larger than a pencil. Under these circumstances, and the rule stated *supra*, it cannot be said that the evidence shows conclusively that appellee was guilty of contributory negligence, even if it could be said that it was his duty to observe the condition of the bolts in the exercise of ordinary care for his own safety.

It is also contended that the unsafe condition which caused appellee's injury was a transitory one, arising in the progress of the work, by the manner in

9. which appellee and his fellow servant, Brash-ear, discharged duties owing by them to appellant. It may be conceded that the undisputed evidence shows that the condition which resulted in appellee's injury was a transitory one, but there is evidence which tends to show that such condition was produced solely by the negligence of the said Brash-ear. The question arises, Is a master, in an action prosecuted under the Employers' Liability Act of 1911, *supra*, chargeable with the negligence of a servant in the discharge of a duty owing to his master, which creates a transitory danger, resulting in an injury to a fellow servant? Appellant has cited a number of decisions of this and the Supreme Court in support of its contention that the master is not liable under such circumstances. These decisions support the general rule applicable to cases prosecuted under the common law that where a master provides for his servants a safe place in which to work, and safe appliances with which to work, he is not liable for transitory dangers produced by the manner in which the work is done. It is apparent, however, that this rule can have no application in a case, prosecuted under an act abrogating the fellow-servant rule, where the complaint charges, and the evidence tends to prove, that the transitory danger was the result of the negligence of a fellow servant. Section 1 of the act under which this action is prosecuted abrogates the common-law defense based on the negligence of a fellow servant, in the class of cases to which this action belongs. §8020a Burns 1914, Acts 1911 p. 145.

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In such cases the negligence of the fellow servant is deemed to be a breach of duty on the part of the master. *J. Wooley Coal Co. v. Tevault, supra; Chicago, etc., R. Co. v. Mitchell, supra; Chicago, etc., R. Co. v. Mitchell* (1916), 184 Ind. 588, 110 N. E. 680. It follows that appellant cannot escape liability in this case by an application of the rule which it seeks to invoke.

Appellant has waived all other reasons for a new trial, stated in its motion therefor, by failing to make any specific references thereto in its proposi-

10. tions or points, as required by the rules governing the preparation of briefs. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362; *Merchants Nat. Bank v. Nees* (1916), 62 Ind. App. 290, 110 N. E. 73, 112 N. E. 904. We find no reversible error in the record. Judgment affirmed.

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CACA v. WOODRUFF.

[No. 10,487. Filed April 25, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation.*—*Casual Employment.*—Though §9 of the Workmen's Compensation Act expressly excepts casual laborers from the compensatory provisions of the law, yet, under §76, clause b, of the act, an injured workman may recover compensation, even though his employment is casual, if the employment is in the usual course of the employer's business. p. 96.
2. MASTER AND SERVANT.—*Workmen's Compensation.*—“*Employee*”—“*Usual Course of Employment.*”—Since additions and repairs to buildings and machinery are necessary to the proper conduct of the milling business, the constructing and making of such additions and repairs is employment “in the usual course of the employer's business” within the meaning of §76 of the Workmen's Compensation Act, defining “employee.” p. 96.
3. MASTER AND SERVANT.—“*Usual Course of Business.*”—*Independent Contractor.*—A carpenter engaged at different times in build-

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ing an addition, and in making repairs, to a mill under the supervision of the owner, for which he was paid weekly at a fixed price per hour, the owner furnishing materials, was an "employee" within the meaning of §76 of the Workmen's Compensation Act, and not an independent contractor, such work being in the usual course of the milling business. p. 97.

From the Industrial Board of Indiana.

Proceedings by John H. Woodruff, employe, against Grant Caca, employer, for compensation under the Workmen's Compensation Act. From an award, the employer appeals. *Affirmed.*

*Thomas E. Kane*, for appellant.

*Gentry & Campbell*, for appellee.

MCMAHAN, J.—The appellee filed his petition with the Industrial Board for compensation under the Workmen's Compensation Law. Acts 1915 p. 392, §80201 *et seq.* Burns 1914. He was awarded compensation at the rate of \$9.90 per week during total disability, not exceeding 500 weeks, and \$75 for medical and hospital services. The appellant has appealed from the award, and the error assigned and relied upon for reversal is "that the award of the full board is contrary to law."

The facts, as shown by the evidence, are in substance as follows: During the months of September, October and November, 1917, and prior thereto, the appellant was the owner and operator of a mill in Noblesville, Indiana, in which he was engaged in the business of grinding wheat and corn and manufacturing feed stuffs; that during said time, and prior thereto, appellee was a carpenter; that in the early part of September, 1917, appellant desired to have a new room added to his mill and to make some repairs in the then existing mill building, and for that pur-



pose employed appellee and another man to construct the said room and make the repairs, and agreed to pay them a fixed price per hour for their labor; that appellant was to and did furnish all the material. When appellant employed appellee, appellant informed him that the new room and part of the old building was to be covered with tin siding if he could get it. The appellee and his fellow workman undertook said work and worked under the direction and instruction of appellant. The appellant during the progress of the work visited the work three or four times daily, and made suggestions and consulted with appellee as to the method of doing the work. The construction of the additional room and making the repairs took between two and three weeks' time. This work consisted in taking the roof off a shed or driveway, which was a part of the mill building, and constructing a room above one end of the driveway, in the lowering of a floor, in building a stairway and changing and hanging a door, and in constructing bins for holding grain, flour, meal and feed stuffs. The men doing the work were paid each Saturday for the work done during the week. About the time the new room and the repairs were completed, appellant informed the appellee that when he procured the tin siding he would let appellee know, as he wanted appellee to return and put it on. Some time in November the tin siding was procured, and appellant sent word to appellee to come and put it on. Appellee, with the other workman, returned and began putting on the siding, working two days, and while engaged in such work on the morning of the third day, and while standing upon a ladder, became overbalanced and accidentally fell, fracturing his hip. A discharging sore developed as

a result of the injury and it continued its discharge for a period of six months, and from the time of his injury to the time of the hearing before the Industrial Board appellee was wholly disabled for work. That an average weekly wage of \$18 was being earned by appellee at the time of his injury. Appellant knew of the injury at the time, but failed to furnish a doctor, and appellee incurred an expense for that purpose of \$75, within the first thirty days after the injury.

The appellant contends that the appellee was a casual laborer and, for that reason, not entitled to compensation.

Section 9 of the Workmen's Compensation Act, *supra*, expressly excepts casual laborers from the compensatory provisions of the law. Section

1. 76, clause b, of said act, provides that the word "employe" shall include every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer. It is quite clear that under our statute a workman can recover compensation even though his employment is casual, if his employment is in the usual course of the employer's business.

The appellant was engaged in the milling business, the proper conduct of which required a building and machinery. Buildings and machinery used in

2. such a business at times need to have additions and repairs made thereto. These additions and repairs must be expected and provided for. They are necessary in any business such as that in which appel-

lant is engaged. The making of repairs was a necessary part of his business which he was required to anticipate when the necessity of his business demanded, or his convenience dictated.

The Supreme Court of Wisconsin in a case similar to the one at bar, in speaking of repairs, said: "Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial." *Holman Creamery Assn. v. Industrial Comm.* (1918), 167 Wis. 470, 167 N. W. 808.

Work like that which the appellee was performing at the time of his injury is usual, and, in our judgment, is within the purview of the Workmen's

3. Compensation Act. The work which appellee was doing when injured being in the course of appellant's business, it is not necessary for us to enter into a discussion of the question as to who is, or who is not, a casual employe.

We hold that the appellee was not an independent contractor, that the work which he was doing when injured was in the usual course of appellant's business, and that the award of the board should be affirmed.

The award is affirmed, and, by virtue of the statute, the amount thereof is increased five per cent.

## REMBARGER ET AL. v. LOSCH.

[No. 9,441. Filed March 1, 1918. Rehearing denied June 28, 1918.  
Transfer denied April 25, 1919.]

1. PLEADING.—*Demurrer.*—*Appeal.*—*Waiver of Defects.*—In view of §344 Burns 1914, Acts 1911 p. 415, an appellant who demurred to a complaint waives defects not specified in the memorandum filed with the demurrer. p. 101.
2. APPEAL.—*Theory of Case.*—*Effect on Appeal.*—Where a complaint was susceptible of the theory adopted by the trial court, such theory will be adhered to on appeal, and, before a judgment may be sustained on the complaint, it must appear that the plaintiff is entitled to the relief granted on such theory, since a party may not sue upon one theory and recover upon another. p. 102.
3. MINES AND MINERALS.—*Leases.*—*Forfeiture.*—*Equitable Relief.*—*Adequate Legal Remedy.*—To entitle a lessor of mining property to equitable relief by way of forfeiture or cancellation of the lease for the lessee's failure to make stipulated payments, it must appear that there is not an adequate remedy in damages, since equity will not interfere where there is an adequate remedy at law. p. 103.
4. MINES AND MINERALS.—*Leases.*—*Equitable Relief.*—*Burden of Proof.*—A lessor of mining property seeking a forfeiture of the lease because of the lessee's failure to make stipulated payments, has the burden of showing that there is no adequate legal remedy. p. 103.
5. MINES AND MINERALS.—*Oil and Gas Leases.*—*Nature of Right.*—While oil and gas leases in the first instance usually grant the lessee merely the right to explore, yet, if such exploration and development is made in accordance with the lease, and oil or gas is produced, the lessee acquires an interest in the land. p. 103.
6. MINES AND MINERALS.—*Oil and Gas Leases.*—*Forfeiture.*—Rights acquired in land by an oil and gas lessee, by reason of his exploration and development of the land, will not be forfeited unless it clearly appears that it would be inequitable to permit the lessee to assert longer such interest. p. 103.
7. MINES AND MINERALS.—*Oil and Gas Leases.*—*Forfeiture.*—*Adequate Legal Remedy.*—Though provisions for forfeiture in an oil and gas lease are for the benefit of the lessor and are more

strictly enforced than such provisions in ordinary leases; yet, where a lessee had acquired an interest in the land by reason of his exploration and development thereof under a lease containing forfeiture provisions for the failure to make stipulated payments, or to furnish the lessor with gas for household purposes, and time was not made the essence of the contract, the failure to perform such provisions did not work a forfeiture, since in such case equity regards the payment or performance as the real or principal intent and the forfeiture merely as an accessory, and will not enforce the forfeiture, as the lessor could be adequately compensated in damages. p. 104.

From Jay Circuit Court; *James J. Moran*, Judge.

Action by William J. Losch against Alva M. Rembarger and another. From a judgment for the plaintiff, the defendants appeal. *Reversed*.

*John W. Newton, Simmons & Daily* and *John J. Kelly*, for appellants.

*Canada & Chenoweth, LaFollette & McGriff* and *S. A. D. Whipple*, for appellee.

BATMAN, P. J.—On March 4, 1914, appellee filed his complaint in two paragraphs against appellants, by which he sought the cancellation of a certain oil and gas lease, which he alleges he had executed to appellant Alva M. Rembarger. The first paragraph contains a copy of said lease, which, it is alleged, was executed on October 3, 1911. It provided in substance, among other things, that it was to run for ten years from its date and as much longer as mineral, oil, natural gas, or other valuable substances should be found on such premises in paying quantities; that appellee was to have one-eighth of all the oil produced and saved on the leased premises; that the lessee was to pay to the lessor “the sum of free gas for one well (for household use), and \$50.00 per year for the gas from each and every well drilled on the premises, to

be paid yearly thereafter while the gas from such well is so used off the premises"; that in the event the lessee should fail to comply with the conditions of such lease, or pay the cash consideration mentioned therein, within the ninety days given therefor, "the lease may be declared null and void, and the right to so declare this lease null and void shall extend to both parties to this agreement, together with their heirs, executors, grantees, successors or assigns, and sub-lessees." Said paragraph then alleges that by the mutual mistake of all the parties to the lease and by the mutual mistake of the scrivener who drew the same the real estate was erroneously described therein as being in section 20, when in truth and fact said land was in section 3. It then alleges facts showing a development of such premises in the years 1911 and 1912, by drilling of four wells which produced both oil and gas; the operation of the same, and the use of gas off said premises since March 15, 1912, from all of said four wells so drilled; the refusal to pay for the gas so used off said premises, although such payment had been frequently demanded; an election by appellee February 5, 1914, to declare said lease forfeited because of the refusal to comply with the conditions thereof as alleged; the service of notice of such forfeiture on the said Alva M. Rembarger and New Pittsburgh Oil and Gas Company, to whom said Rembarger claimed he had assigned said lease; the continued operation of said wells for oil and gas, and the use of gas off said premises from each of said wells, after the forfeiture and the service of such notice, and the continued refusal to furnish appellee gas for household use, or to comply with the conditions of the lease as alleged. Prayer that the lease be declared forfeited and appellee's title quieted.

The second paragraph of complaint is the same as the first, except that it asks in addition a judgment for \$300 for the alleged use of gas off the premises. Appellants filed separate demurrers to each paragraph of the complaint for want of facts, which were overruled and proper exceptions reserved.

Appellants then answered by general denial, and also by two affirmative paragraphs of answer, to which a reply in general denial was filed.

Trial was had by the court, and judgment was rendered in favor of appellee on the first paragraph of complaint, reforming and canceling such lease, and giving appellee sixty days to remove his property from the premises. Appellants filed a motion for a new trial, which was overruled and proper exceptions reserved. The errors assigned by appellants are based on the action of the court in overruling their demurrers to each paragraph of the complaint, and in overruling their motion for a new trial.

Appellants have stated a number of points, and cited a number of authorities, in support of their contention that the court erred in overruling their

1. demurrers to each paragraph of the complaint.

Such contention, however, is not based on any defects stated in the memorandum filed with the demurrer, and are therefore waived. §344 Burns 1914, Acts 1911 p. 415; *State, ex rel. v. Bartholomew* (1911), 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B 91; *Spurgeon v. Olinger* (1917), 64 Ind. App. 176, 115 N. E. 680.

Appellants base their alleged error in overruling their motion for a new trial on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Since the judgment was rendered on the first paragraph of complaint, we are only required to consider the grounds for a new trial in relation thereto.

2. The trial court evidently construed this paragraph as a proceeding in equity, seeking a decree reforming and canceling the lease in question, as appears from the relief granted. Said paragraph being susceptible of such construction, and the case being so tried, such theory will be adhered to on appeal. *Pittsburgh, etc., R. Co. v. Lamm* (1916), 61 Ind. App. 389, 112 N. E. 45; *Studabaker v. Faylor* (1908), 170 Ind. 498, 83 N. E. 747, 127 Am. St. 397; *Ditton v. Hart* (1911), 175 Ind. 181, 93 N. E. 961. By the allegations of said paragraph such right of cancellation is based on an alleged forfeiture by reason of certain specific violations of such lease stated therein. Before the judgment can be sustained, it must appear that appellee is entitled to the relief granted on the case thus presented, as he cannot sue upon one theory and recover upon another. *Louisville, etc., R. Co. v. Renicker* (1893), 8 Ind. App. 404, 35 N. E. 1047; *Pennsylvania Co. v. Walker* (1902), 29 Ind. App. 285, 64 N. E. 473.

Appellants first contend that the evidence fails to establish any alleged violation of the lease in question. The only violations alleged are the failure to pay the annual amounts for each well, while gas therefrom was used off said premises, and to furnish free gas for household use. The trial court evidently found that such allegations had been sustained, and, as there was evidence which tends to support the same, we are bound by such finding. It only remains for this court to determine whether such violations are sufficient to warrant the judgment rendered.



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It is a well-settled rule that where there is an adequate remedy at law, equity will not interfere, and that extraordinary remedies cannot be invoked.

3. *Ploughe v. Boyer* (1871), 38 Ind. 113; *Geiser Mfg. Co. v. Lee* (1904), 33 Ind. App. 38, 66 N. E. 701; *Handley v. Sprinkle* (1904), 31 Mont. 57, 77 Pac. 296, 3 Ann. Cas. 531; *Sunset Tel., etc., Co. v. Williams* (1908), 162 Fed. 301, 89 C. C. A. 281, 22 L. R. A. (N. S.) 374. In harmony with this rule it is well settled that, to entitle a lessor of mining property to equitable relief by way of forfeiture or cancellation of a lease, for the lessee's failure to *make stipulated payments*, it must appear that there is not an adequate remedy at law by suit for damages. 2 Black, Rescission and Cancellation 1139, §472. The burden is upon the plaintiff to establish an absence of such remedy, when relief in equity is sought. *Kyle v. Frost* (1868), 29 Ind. 382; *Seymour Water Co. v. City of Seymour* (1904), 163 Ind. 120, 70 N. E. 514; *Howerton v. Kansas, etc., Gas Co.* (1910), 81 Kan. 553, 106 Pac. 47, 34 L. R. A. (N. S.) 34, 47.

It is also well settled that, while oil and gas leases in the first instance usually grant to the lessee merely the right to explore for such products, if such

5. exploration and development is made in accordance with the terms of such lease, and oil or gas is produced thereby as therein provided,
  3. such lessee acquires an interest in such land.
- Thornton, Oil and Gas* (2d ed.) §332a; *Ohio Oil Co. v. Griest* (1902), 30 Ind. App. 84, 65 N. E. 534; *Carr v. Huntington Light, etc., Co.* (1904), 33 Ind. App. 1, 70 N. E. 552; *Shenk v. Stahl* (1905), 35 Ind. App. 493, 74 N. E. 538; *Ramage v. Wilson* (1910), 45

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Ind. App. 599, 88 N. E. 862; *Johnson v. Sidey* (1915), 59 Ind. App. 678, 109 N. E. 934. When an interest in real estate has been thus acquired by a lessee, it will not be forfeited, unless it clearly appears that it would be against equity to permit the lessee longer to assert such interest. *Gadbury v. Ohio, etc., Gas Co.* (1904), 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895.

While it is true that provision for forfeitures in oil and gas leases are for the benefit of the lessor, and are more strictly enforced than in the ordinary

7. lease between landlord and tenant, yet it is not a rule of universal application that all defaults made by the lessee entitle the lessor to declare a forfeiture, or to have a decree canceling the lease. If such forfeiture be for the nonpayment of money or the performance of some other act, equity regards such payment or performance as the real or principal intent and the forfeiture merely as an accessory, where time is not made of the essence of the contract, and will not enforce such forfeiture, where the actual damages sustained by the other party can be adequately compensated. Thornton, Oil and Gas (2d ed.) 262, §187; *Maginnis v. Knickerbocker Ice Co.* (1901), 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833, note; *Lynch v. Versailles Gas Co.* (1895), 165 Pa. St. 518, 30 Atl. 984; *Edwards v. Iola Gas Co.* (1902), 65 Kan. 362, 69 Pac. 350; *South Penn Oil Co. v. Edgell* (1900), 48 W. Va. 348, 37 S. E. 596, 86 Am. St. 43.

Applying these rules to the facts in the instant case, it should be noted that there is no claim on the part of appellee that there has been a failure to explore

7. or develop the premises, or to find and produce oil and gas. Therefore the case presented is not one where the lessee has sinned away his opportu-

nity to explore or develop, or has failed to find and produce, but one in which all of this has been done, and appellants have acquired an interest in the real estate thereby. Furthermore, it should be noted that time is not made of the essence of the contract, and there is no evidence which tends to show that the actual damages sustained for the violations alleged cannot be definitely ascertained or adequately compensated in an action at law. Under such a state of facts appellee was not entitled to a decree canceling the lease in suit. The conclusion we have reached is in harmony with the rule laid down in the case of *Seymour Water Co. v. City of Seymour, supra*, wherein it is held that a party who seeks the cancellation of a contract which has been wholly or partially executed by the opposite party must show a necessity for such remedy, and especially must show the lack of an adequate remedy at law.

We therefore conclude that the court erred in overruling appellant's motion for a new trial, for which error judgment is reversed, with instructions to sustain such motion, and for further proceedings not inconsistent with this opinion.

Hottel, J., dissents. Caldwell, J., not participating.

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IRVINE ET AL. v. BAXTER STOVE COMPANY.

[No. 9,766. Filed May 6, 1919.]

1. APPEAL.—*Briefs.—Amendment.*—Where, after the filing of the appellee's brief, the appellant by leave of court amended his brief by inserting a copy of the motion for new trial, the omission to include the motion or its substance in the original brief was cured. p. 108.

2. **APPEAL.**—*New Trial.*—*Necessity of Objections.*—*Instructions.*—Objections to the giving of instructions will not be considered on appeal where the appellant failed to assign error thereon as a ground for new trial. p. 108.
3. **PARTNERSHIP.**—*Holding Out as Partner.*—*Necessity of Financial Loss.*—Where one holds himself out as a partner or knowingly permits himself to be so held out, he is liable to a creditor dealing with the firm, in the belief that such representation is true, as fully as if he were a partner in fact; and it is not necessary that the creditor suffer financial loss by reason of such holding out. p. 108.
4. **APPEAL.**—*Instructions Favorable to Appellant.*—*Harmless Error.*—Instructions that the plaintiff creditor could not recover from a defendant for holding himself out as a partner of the debtor firm unless such plaintiff sustained, or stands to sustain, financial loss by reason of such holding out, though erroneous for placing a greater burden on the plaintiff than required by law, was harmless as to such defendant. p. 110.
5. **APPEAL.**—*Objections to Evidence.*—*Presenting for Review.*—*Briefs.*—To present for review the rulings of the court in admitting certain evidence, the appellant's brief must disclose the specific objections made to such evidence at the time of the ruling; objections thereto in the motion for new trial, without a showing that the same were presented at the time of the ruling, present no question. p. 110.
6. **TRIAL.**—*Evidence.*—*Competent for Specific Purpose.*—*Limiting Application.*—Since evidence competent for some purpose will not be excluded because the jury may erroneously use it for another purpose, it is the duty of a party desiring to guard against such possibility to tender an instruction limiting its application to the particular purpose. p. 111.
7. **APPEAL.**—*Record.*—*Sufficiency.*—*Bringing Matters into Record.*—*Affidavit.*—The statement in an affidavit filed with the motion for new trial that the court had stated in the jury's presence that it would limit by instruction the application of certain evidence, is insufficient to excuse the appellant's failure to tender an instruction for that purpose, since such matter cannot be brought into the record by affidavit. p. 111.
8. **APPEAL.**—*Verdict.*—*Evidence.*—*Sufficiency.*—A verdict is sustained by sufficient evidence, as against objection on appeal, where there is legal evidence supporting every essential fact necessary to appellee's right of recovery. p. 112.
9. **APPEAL.**—*Waiver of Error.*—*Briefs.*—An appellant waives grounds for new trial to which no specific reference is made in the points and authorities of his brief. p. 112.

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Irvine v. Baxter Stove Co.—70 Ind. App. 105.

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From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by the Baxter Stove Company against James T. Irvine, Jr., and James T. Irvine, Sr. From a judgment for the plaintiff, the defendant James T. Irvine, Sr., appeals. *Affirmed*.

*Osborn & Hamilton, Benjamin F. Miller and Howard E. Barrett*, for appellant.

*John H. Kiplinger and Donald L. Smith*, for appellee.

BATMAN, P. J.—The complaint in this action is in two paragraphs, in which appellee is plaintiff, and James T. Irvine, Jr., and James T. Irvine, Sr., are defendants. The first paragraph is based on a promissory note alleged to have been executed to appellee by the said Irvine and Irvine under the firm name and style of James Irvine and Company. The second paragraph alleges in substance that said James T. Irvine, Sr., held himself out as a partner in the firm of James Irvine and Company, and knowingly permitted James T. Irvine, Jr., to hold him out as a partner in said firm, with the intention that appellee should act on such representation as being true; that appellee, believing said representation, and having no knowledge that the same was not true, was induced thereby to sell goods and extend credit to said James Irvine and Company, and to accept a certain promissory note for \$166.18 executed by said company; that said note is now due and unpaid. Each paragraph of the complaint referred to the same promissory note, which was made a part thereof by a copy filed as an exhibit therewith. James T. Irvine, Jr., filed an answer in two paragraphs, the first being a general denial, and the second a plea of payment. James T.

Irvine, Sr., also filed an answer in two paragraphs, the first being a general denial, and the second a plea of *non est factum*. To the second paragraph of the answer of James T. Irvine, Jr., appellee filed a reply in general denial. The cause was submitted to a jury for trial, resulting in a verdict for appellee, on which judgment was duly rendered. James T. Irvine, Sr., filed a separate motion for a new trial, which was overruled. He is now prosecuting this appeal, and has assigned the action of the court in overruling his motion for a new trial as the sole error on which he relies for reversal.

Appellee contends that no question is presented for our determination, as neither the motion for a new trial nor its substance is set out in appellant's

1. brief. Since the filing of appellee's brief, appellant, by leave of court, has amended his brief by inserting therein a copy of said motion, which has cured the alleged omission therein.

Appellant contends that the court erred in giving instructions Nos. 7, 9, 12 and 13 on its own motion.

We are not required to consider any objections made to instructions Nos. 7 and 9, as appellant did not assign the action of the court in giving either

2. of them as a ground for a new trial. *Parker Land, etc., Co. v. Ayres* (1909), 43 Ind. App. 513, 87 N. E. 1062.

Said instructions Nos. 12 and 13, given by the court on its own motion, relate to the cause of action stated in appellee's second paragraph of complaint.

3. By these instructions the jury was informed in effect that there could be no recovery against appellant on said paragraph, unless the jury should find that appellant, by his acts or language, know-

ingly, voluntarily and intentionally held himself out to appellee as a partner in the alleged firm of James Irvine and Company, or so permitted himself to be so held out by said James T. Irvine, Jr., and that by reason of said fact appellee has sustained some financial loss, *or stands to sustain a financial loss*. Appellant bases his objection to said instructions on the clause which we have italicized. He insists that appellee must have sustained some financial loss before there can be a recovery on said second paragraph of complaint. We do not understand that appellee was required to establish such fact. It is well settled that where one holds himself out as a partner in a particular firm, or knowingly permits himself to be so held out, he is liable to those who deal with such firm, in the belief that such representation is true, as fully as if he were a partner in fact. 30 Cyc 391; 20 R. C. L. 1067; Story, Partnership (7th ed.) §64; *Strecker v. Conn* (1883), 90 Ind. 469; *Breinig v. Sparrow* (1907), 39 Ind. App. 455, 80 N. E. 37; *Steele v. Michigan Buggy Co.* (1912), 50 Ind. App. 635, 95 N. E. 435; *Phipps v. Little* (1913), 213 Mass. 414, 100 N. E. 615; *Peck v. Lusk* (1874), 38 Iowa 93; 2 Brickwood, Sackett's Instructions §2201. A person becoming a creditor of such a firm under the circumstances stated would have a right to join a party so held out as a member thereof in an action against the real members of such firm, and recover a joint judgment against all without alleging or proving that he had suffered, or may suffer, a financial loss by reason of such holding out. An instruction authorizing a recovery without such a condition was approved by the Supreme Court in the case of *Dailey v. Coons* (1878), 64 Ind. 545.

It follows that said instructions are erroneous, but

there was no reversible error in giving the same as they placed a greater burden on appellee than

4. the law required it to assume, and therefore were favorable to appellant. *Pennsylvania Co. v. Stalker, Admr.* (1918), 67 Ind. App. 329, 119 N. E. 163.

Appellant also contends that the court erred in refusing to give instructions Nos. 3 and 4 requested by him. These instructions are the same as Nos. 12 and 13 given by the court on its own motion, except that neither of them contain the clause which we have italicized above. For the reasons stated in passing on said instructions given, there was no error in refusing to give said requested instructions.

Appellant in his motion for a new trial alleges that the court erred in the admission of certain evidence, but has failed to present any question thereon

5. for our determination, as his brief does not disclose what objections, if any, were made in the trial court to the admission of such evidence at the time it was offered. Only such objections thereto as were made at such time are available on appeal. *McCray v. Whitney* (1914), 56 Ind. App. 94, 104 N. E. 979. And the brief of the complaining party must show what these objections were. *Templer v. Thompson* (1917), 66 Ind. App. 222, 117 N. E. 936. True, certain objections thereto are stated in the motion for a new trial, some of which appellant has attempted to present in his brief, but these will not be considered in the absence of a showing that they were made to the trial court when it ruled on the admissibility of such evidence.

However, the only portion of such objectionable evidence to which appellant has made any reference



in his propositions or points consists of a certain letter written by one Elmer Hutchinson, and another by Perry C. Kirtley. The record fails to disclose that any objections were made in the trial court to the admission of the former letter, and hence there was no reversible error in its admission. The latter letter was written to appellant in response to one received from him, the contents of which had been given in evidence without objection. It was pertinent to the issues formed on the first paragraph of the complaint, and there was no error in its admission under the facts and circumstances shown by the record.

Appellant predicates error on the failure of the court to instruct the jury that the letter of Perry C.

Kirtley should not be considered as affecting

6. the issues under the second paragraph of the complaint. It is a well-settled rule that evidence competent for some purpose should not be excluded because a jury may erroneously use it for another purpose. 10 R. C. L. 929. A party desiring to guard against such possibility should tender an instruction limiting its application to the matter for which it is competent. *Clark v. Clark* (1917), 187 Ind. 25, 118 N. E. 123; *International Harvester Co. v. Hauweisen* (1918), 66 Ind. App. 355, 118 N. E. 320.

Appellant, however, seeks to avoid an application of this rule in the instant case on the ground that the court in the presence of the jury stated that it

7. would instruct the jury in that regard. The only evidence of any such statement appears by affidavit filed with the motion for a new trial. This is not sufficient, as matters of this kind cannot be brought into the record this way. *Hood v. Tyner* (1891), 3 Ind. App. 51, 28 N. E. 1033; *Dorsey v. State*

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Granite Sand, etc., Co. v. Willoughby—70 Ind. App. 112.

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(1913), 179 Ind. 531, 100 N. E. 369; *Shank v. State* (1915), 183 Ind. 298, 108 N. E. 521. Therefore we cannot say that appellant was relieved from a compliance with the rule cited.

Appellant also contends that the verdict is not sustained by sufficient evidence. We cannot concur in

8. this contention, as there is legal evidence supporting every essential fact necessary to appellee's right of recovery. This is sufficient on appeal. *Ellison v. Ryan* (1909), 43 Ind. App. 610, 87 N. E. 244.

Other grounds for a new trial are waived by appellant by a failure to make any specific reference

9. thereto in his propositions or points. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362.

We find no reversible error in the record. Judgment affirmed.

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GRANITE SAND AND GRAVEL COMPANY v. WILLOUGHBY  
ET AL.

[No. 10,492. Filed May 8, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation Acts.—Construction.—Injuries Arising Out of and in Course of Employment.*—Workmen's compensation acts should be given a broad and liberal construction in determining whether an accident producing an injury arose out of and in course of the employment. p. 115.

2. MASTER AND SERVANT.—*Injuries to Servant.—Workmen's Compensation Act.—Injuries in Course of Employment.*—An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), when it occurs within the period of the employment at a place where the employe may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it. p. 115.

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3. MASTER AND SERVANT.—*Injuries to Servant.—Workmen's Compensation Act.—Injuries Arising Out of and in Course of Employment.*—Where an employe, engaged in picking out sticks and foreign substances from gravel loaded into railroad cars by the employer, remained in a car while it was being moved away from the loading chute in order to permit the removal of a loaded car, and was thrown out of such car while it was being switched, the accident causing the injury arose out of and in course of the employment. p. 115.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by George Willoughby and others against the Granite Sand and Gravel Company. From an award for applicants, the defendant appeals. *Affirmed.*

*Joseph W. Hutchinson*, for appellant.

*Salem D. Clark*, for appellees.

NICHOLS, J.—This was an application by the appellees as dependents of Cecil Willoughby against the appellant for the adjustment of their claim for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns 1914, wherein it was claimed that said Cecil Willoughby died as a result of an injury arising out of and in the course of his employment by appellant.

As appears by the board's findings, the material facts are that: On June 15, 1918, one Cecil Willoughby was in the employment of the defendant at an average weekly wage of \$18; that at said time the defendant was engaged in the operation of a gravel pit from which it was shipping gravel; that leading from a main railroad track a switch led into the premises occupied by the defendant and over which it shipped gravel; that the defendant loaded cars by

means of a chute through which it conveyed the gravel into the cars; that as cars were thus loaded they were pushed down the switch and away from the main track, and another car was brought under the chute for the purpose of loading; that because of such position of cars it became necessary when loaded cars were to be removed at a time when a car was in the process of loading to remove such car from under the chute in order that the loaded cars might be removed; that as the gravel was conveyed into the car the defendant had employes therein to pick out dirt, sticks, and foreign substances; that the said Cecil Willoughby was employed for such service on June 15, 1918, was engaged therein, and in the discharge of said duties was standing in a car picking out sticks, dirt and foreign articles from the gravel that was being conveyed therein through the chute; that while the said Cecil Willoughby was so engaged the railroad switching crew desired to remove the loaded cars; that in company with another employe, who was also working in the car with him, the said Cecil Willoughby got out and assisted to raise the chute so that the cars could be removed; that after raising the chute the said Cecil Willoughby re-entered the car in which he had been working, and while said car was being switched by the railroad switching crew the said Cecil Willoughby was accidentally thrown out of said car, which ran over his body, inflicting injuries which resulted in his death on said date; that the defendant had at no time instructed the said Cecil Willoughby that he should not remain in the car in which he was employed to work when it was being switched; that the defendant had actual knowledge of the injury and the death of the said Cecil Willoughby at the time of

the occurrence; that the said Cecil Willoughby left surviving him the appellees as his dependents.

On these findings there was an award against the appellant of 300 weeks' compensation at the rate of \$9.90 per week, beginning June 15, 1918, and an order to pay burial expenses not to exceed \$100. From this award an appeal was prayed, and granted to this court. The only error relied upon for reversal is that the award of the full board in said cause is contrary to law.

It has been held by the courts elsewhere, as well as in this state, that the workmen's compensation acts should be liberally construed, and should be

1. given a broad and liberal construction in order that the humane purposes of their enactment may be realized, and this is certainly true in determining whether an accident that produced injury arose out of and in due course of the employment. *Holland, etc., Sugar Co. v. Shraluka* (1917), 64 Ind. App. 545, 116 N. E. 330. An injury occurs in the course of the employment, within the meaning of the Compensation Act, when it occurs within
2. the period of the employment, at a place where the employe may reasonably be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it. *In re Ayers* (1918), 66 Ind. App. 458, 118 N. E. 386; *Fairbank Co. v. Industrial Comm.* (1918), 285 Ill. 11, 120 N. E. 457.

In this case, the employe's duties require him to work inside of a railroad car standing on a switch, at a chute from which the car was being loaded.

3. It became necessary to remove the car from the chute in order that certain cars behind it might

be taken away. After assisting in lifting the chute, he re-entered the car and stayed with it while it was away from the chute, until he was injured. He was in the place where his duties required him to be, and ready to commence them as soon as his car was reset at the chute. The appellant by its superintendent knew that sometimes the men remained in the car, but never gave them any instructions concerning what they should do while the car was being moved. No instructions were given to the decedent as to what he should do while his car was being moved, though such conduct could have been prohibited if deemed improper. It is not unreasonable that he believed, and we hold that he had a right to believe, that he was in his proper place when he was in the car where his duties required him to be as soon as the car was in proper position again. We hold that Cecil Willoughby received the injury that resulted in his death, while in the due course of his employment, and that his injury and death grew out of his employment.

The award of the Industrial Board is affirmed, with five per cent. penalty as provided by statute.

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WILSON v. BASS ET AL.

[No. 9,647. Filed January 9, 1918. Rehearing denied June 25, 1918. Transfer denied May 8, 1919.]

1. DESCENT AND DISTRIBUTION.—“*Child*.”—“*Children*.”—“*Descendants*.”—*Statutes*.—The words “child,” “children,” and “descendants” and the like, as used in §§2990, 2991 Burns 1914, §§2467, 2468 R. S. 1881, regulating descent in certain cases, *prima facie* mean legitimates. p. 119.
2. BASTARDS.—*Inheritance*.—*Statute Governing*.—*Construction*.—Section 3000 Burns 1914, Acts 1901 p. 288, providing that illegiti-

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mate children may, under certain conditions, inherit the estate of their fathers, is remedial, and should be liberally construed within its terms to effectuate the purpose of its enactment. p. 119.

3. **BASTARDS.—Acknowledgment by Parent.—Statute.—Scope and Effect.**—Section 3000 Burns 1914, Acts 1901 p. 288, providing that illegitimate children may, under certain conditions, inherit the estate of their fathers, is merely a statute of descent, and thereunder the legal status of the child is not changed from illegitimacy to legitimacy by the father's acknowledgment. p. 125.
4. **BASTARDS.—Inheritance Through Father.—Statutes.**—Under §§2990-3000 Burns 1914, §§2467, 2468 R. S. 1881, Acts 1901 p. 288, regulating descent in certain cases, an illegitimate child cannot inherit from the mother of its putative father, where the latter dies before the mother. p. 126.

From Decatur Circuit Court; *Hugh Wickens*, Judge.

Action by Clinton O. Wilson against Laura J. Bass and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Carey & Karns, Remy & Berryhill and William H. Remy*, for appellant.

*Will A. Yarling and D. L. Wilson*, for appellees.

**CALDWELL, J.**—A judgment was entered against appellant by reason of his refusal to plead over on the sustaining of a demurrer to his complaint. The material facts alleged were substantially as follows: There were born to Riley D. and Mahala H. Wilson, husband and wife, three children, viz., Alonzo L. Wilson, Alma Cora Wilson and appellee Laura J. Bass. Alonzo L. Wilson died in 1894. Appellant is his illegitimate son. Alonzo recognized and acknowledged appellant as his son. The former on his decease left surviving him no widow or legitimate child or children, or their descendants, and no illegitimate child or children or their descendants, save appellant as aforesaid.

In 1899 Alma Cora Wilson died intestate, the owner in fee of a certain eighty-acre tract of land in Shelby county, subject to the life estate therein held and owned by her mother. Alma Cora left surviving her no husband or father, or child or children or their descendants, but did leave surviving her her mother, Mahala H. Wilson, and her sister, appellee Laura J. Bass, who it is alleged thereby inherited the fee to said real estate, each the undivided one-half thereof. Mahala died intestate in 1914, the owner in fee of the undivided one-half of said real estate, survived by no parent or child or children except appellee Laura J. Bass. By reason of the facts it is alleged that at the death of Mahala her interest in said lands descended in equal parts to appellant and appellee Laura J. Bass, and that they are now the owners of the said land, the former of one-fourth thereof, and the latter the one-fourth plus the one-half theretofore owned by her. Prayer that title be quieted and partition made accordingly.

It seems to be conceded that under the facts alleged Mahala H. Wilson was the owner in fee of the undivided one-half of said lands. If so, it is plain that at the death of Mahala H. Wilson, her daughter, appellee Laura J. Bass, inherited at least the undivided one-half of such one-half. She inherited also from her mother the other half of such one-half, unless appellant inherited it. It follows under the facts alleged that, if appellant as the illegitimate, but acknowledged, son of Alonzo L. Wilson inherited from Mahala H. Wilson, the mother of his putative father, the one-half of the one-half interest in said lands owned by Mahala H. Wilson at her decease, this cause must be reversed; otherwise affirmed.



Sections 2990, 2991 Burns 1914, §§2467, 2468 R. S. 1881, are to the effect that the real and personal property of any person dying intestate shall de-

1. scend to his or her children in equal portions, and that, if any child be dead leaving a child or children, such child or children shall inherit the share that would have descended to the parent if living. The words "child," "children," "descendants," and the like, as used in such a statute, *prima facie* mean legitimates. *Truelove v. Truelove* (1909), 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220, 139 Am. St. 404; *Jackson v. Hocke* (1908), 171 Ind. 371, 84 N. E. 830; *McDonald v. Pittsburgh, etc., R. Co.* (1896), 144 Ind. 459, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. 185; *Brisbin v. Huntington* (1905), 128 Iowa 166, 103 N. W. 144, 5 Ann. Cas. 931; 3 R. C. L. 774. It follows that on the decease

2. of Mahala H. Wilson her interest in the lands involved here descended to appellee Laura J. Bass, to the exclusion of appellant, unless the cited statutes are modified and controlled by some other statute as applied to the facts of this case. Appellant points to §3000 Burns 1914, Acts 1901 p. 288, as such a modifying statute. It reads in part as follows: "That the illegitimate child or children of any man dying intestate and having acknowledged such child or children during his lifetime as his own, shall inherit his estate, both real and personal, and shall be deemed and taken to be the heir or heirs of such intestate in the same manner and to the same extent as if such child or children had been legitimate. \* \* \*

Provided, That the provisions of this act shall not apply where the father of the illegitimate child, at his death, had surviving legitimate children or de-

scendants of legitimate children." It was a harsh rule of the common law that an illegitimate child had no inheritable blood. Such statutes as §3000, *supra*, are intended to ameliorate the condition of such unfortunates as it existed at common law. They are therefore remedial in nature, and should be liberally construed within their terms to effectuate the purpose of their enactment. *Morin v. Holliday* (1906), 39 Ind. App. 201, 77 N. E. 861; *Goodell v. Yezerski* (1912), 170 Mich. 578, 136 N. W. 451, 40 L. R. A. (N. S.) 516; *Van Horn v. Van Horn* (1899), 107 Iowa 247, 76 N. W. 846, 45 L. R. A. 93; *Brisbin v. Huntington, supra*; 3 R. C. L. 773.

It will be observed that the language of §3000, *supra*, is to the effect that the illegitimate child or children shall inherit the estate of the acknowledging father under the circumstances named. The statute by its terms does not include within its beneficial operation the child or children of such an illegitimate. The courts, however, in construing such statute do not hold it down to its seemingly literal provisions under all circumstances. Thus the facts involved in *Morin v. Holliday, supra*, cited by appellant as conclusive here, were briefly and in part as follows: The intestate, John Cline, had acknowledged as his children two illegitimates, John Holliday and Clara Morin. The latter died before the decease of John Cline, leaving several children, who also had been acknowledged by John Cline as his grandchildren. John Holliday died after the decease of John Cline, leaving heirs. Other facts necessary to invoke the application of §3000, *supra*, existing, this court, applying the rule of liberal construction, held that the children of Clara Morin, in common with John Holliday, inherited the

lands of which John Cline died the owner, and John Holliday having died intestate subsequently to the death of his putative father, his heirs and such children of Clara Morin held and owned such lands in common. The Mprin case subsequently received the approval of the Supreme Court by the denial of the transfer.

But *Truelove v. Truelove*, *supra*, is authority in effect that the rule of liberal construction must be applied within the terms of such a statute, rather than to extend its terms to cases not embraced by its provisions. Thus, in that case Caroline Coats died intestate owning lands in fee, leaving surviving her no parent, husband or descendants. Caroline's mother was the mother of two legitimate children, said Caroline and Timothy O. Truelove, and also two illegitimate sons. Caroline left surviving her brother, Timothy, and also the children of the two illegitimate sons of her mother, both of which sons died before the death of Caroline. The question before the court was whether Timothy inherited from Caroline the lands involved to the exclusion of the children of such illegitimates, or whether such children as heirs of Caroline through their respective fathers inherited an interest therein. The court remarked in substance that, had Caroline's mother and the three sons of the latter survived Caroline, the mother and Timothy would have inherited the land on Caroline's decease under the provisions of §2992 Burns 1914, §2469 R. S. 1881, to the exclusion of the illegitimate sons, since, as we have said, the words "child" and "children" under that section *prima facie* refer to legitimates. The mother, however, and also the two illegitimates, being dead, the latter leaving children, the solution

of the involved question, whether such children in common with Timothy inherited Caroline's lands invoked a construction of §2998 Burns 1914, §2474 R. S. 1881, which is as follows: "Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person." The court in holding that the children of such illegitimates did not inherit under that section said: "Section 2998, *supra*, while it enables the illegitimate child to inherit the property its mother would have taken if living, does not by its terms grant to the child of such illegitimate child such right in case said parent is not living, and the terms thereof cannot be extended so as to give such right."

*Jackson v. Hocke, supra*, also is an authority that there is a limit to the force of the rule of liberal construction when applied to statutes enacted to remove some of the disabilities of illegitimates at common law.

The court in the Morin case supports its conclusion through a process of reasoning by analogy from the statute providing for the adopting of children. §870 Burns 1914, §825 R. S. 1881. This statute contains a provision that the adopted child shall "be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother," while the similar language contained in the statute under consideration is to the effect that the acknowledged child under the circumstances prescribed by the statute shall inherit the estate of the acknowledging intestate "and shall

be deemed and taken to be the heir \* \* \* of such intestate in the same manner and to the same extent as if such child \* \* \* had been legitimate." The court then develops from the authorities that the adopted child becomes the stirps or stock of a new line of inheritance, and that, on the decease of the adopted child before the decease of the adopting father, the surviving children of the former inherit from the latter by representation from his deceased intestate. *Paul v. Davis* (1885), 100 Ind. 422. The court then reasoning from the similarity in language of the two statutes supports its conclusion that the child of the acknowledged illegitimate may inherit from the acknowledging putative father of the illegitimate, under the circumstances of the Morin case. However, if the line of argument from analogy be applied to the facts of this case, the conclusion of the trial court here that appellant, an illegitimate, did not inherit from the mother of his acknowledging father, who died before the decease of his mother, is thereby supported, since it is held that an adopted child does not inherit from the father or mother of the adopting parent. See the following: *Bray v. Miles* (1899), 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510; *Davis v. Fogle* (1890), 124 Ind. 41, 44, 23 N. E. 860, 7 L. R. A. 485; *Wyeth v. Stone* (1887), 144 Mass. 441, 11 N. E. 729. See, also, *Warren v. Prescott* (1892), 84 Me. 483, 24 Atl. 948, 30 Am. St. 370, 17 L. R. A. 435, and note; *Hockaday v. Lynn* (1906), 200 Mo. 456, 98 S. W. 585, 118 Am. St. 672, 9 Ann. Cas. 775, 8 L. R. A. (N. S.) 117, and note; *Merritt v. Morton, Admx.* (1911), 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139, and note; *Barnes v. Allen* (1865), 25 Ind. 222; 1 R. C. L. 621.

Such conclusion of the trial court is thus supported on the assumption that the legal relation created between a putative father and the acknowledged illegitimate by the provision of §3000, *supra*, is as close and intimate as that created between an adopting parent and an adopted child by the provisions of §870, *supra*. However, a comparison of the following discloses that the latter legal relation is the more intimate: *McDonald v. Pittsburgh, etc., R. Co., supra*; *Citizens St. R. Co. v. Cooper* (1899), 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. 319; *Harness v. Harness* (1911), 50 Ind. App. 364, 98 N. E. 357; *Citizens' St. R. Co. v. Willoebly* (1896), 15 Ind. App. 512, 43 N. E. 1058; *Cooley v. Powers* (1916), 63 Ind. App. 59, 113 N. E. 382; 1 R. C. L. 610 *et seq.*; *Omaha Water Co. v. Schamel* (1906), 147 Fed. 502, 78 C. C. A. 68.

It is argued in behalf of appellant that where an illegitimate child is acknowledged, under the provisions of §3000, *supra*, he becomes a legitimate child with full right of inheritance, in the absence of other legitimate children or their descendants, and hence that appellant in this case inherited from the mother of his putative father to the same extent that he would have inherited had he been born in lawful wedlock. We do not believe that the statute is reasonably susceptible of such a construction. The statute by its terms seems plainly to distinguish between an illegitimate and a legitimate child, extending to the former a right to inherit from the putative father only, under certain circumstances, in case of the absence of legitimate children. Thus, the language is to the effect that the illegitimate child of any man dying intestate shall inherit his estate to the same extent as if such child had been legitimate, provided

that the act shall not apply where the father of the illegitimate at his death had surviving a legitimate child. A statute seems to recognize the illegitimate as illegitimate after acknowledgment.

A comparison of §3001 Burns 1914, §2476 R. S. 1881, with §3000, *supra*, confirms us in such conclusion. The former is as follows: "If a man shall marry the mother of an illegitimate child and acknowledge it as his own, such child shall be deemed legitimate." That section in substantially its present form has been in force since 1831. See R. S. 1831 p. 208; R. S. 1843 p. 438; R. S. 1852 p. 249. Under that and similar statutes the status of the child is changed from illegitimacy to legitimacy. *Harness v. Harness, supra*; *Haddon v. Crawford* (1912), 49 Ind. App. 551, 97 N. E. 811; *Brock v. State, ex rel.* (1882), 85 Ind. 397; *Bailey v. Boyd* (1877), 59 Ind. 292; *Harvey v. Ball* (1869), 32 Ind. 98; *Latshaw v. State, ex rel.* (1901), 156 Ind. 194, 199, 59 N. E. 471; *Binns v. Dazey* (1897), 147 Ind. 536, 44 N. E. 644; *Blythe v. Ayres* (1892), 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; *Ives v. McNicholl* (1898), 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. 780; *Leonard v. Braswell* (1896), 99 Ky. 528, 36 S. W. 684, 36 L. R. A. 707; *Adams v. Adams* (1891), 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275, and note; 3 R. C. L. 740, 774.

The predecessor of §3000, *supra*, was enacted in 1853 (§2630 Burns 1894). For purposes of the question we are considering, such original section

3. was not materially different from §3000, *supra*; that is, if under the latter an illegitimate child involved was legitimated, so was he under the original section, and *vice versa*. When such original section, as well as §3000, *supra*, was enacted, §3001, *supra*,

was in force. It would therefore seem that if by §3000 and its predecessor the legislature intended to change the status of the illegitimate to the same extent as by the application of §3001; that is, to a legal status of legitimacy, such legislative purpose could have been much more easily accomplished by an amendment, rather than by a supplemental enactment. Section 3000, *supra*, and similar enactments are merely statutes of descent. Under such a statute the legal status of the child is not changed from illegitimacy to legitimacy. The child remains illegitimate after the acknowledgment. *McDonald v. Pittsburgh, etc., R. Co., supra*; *Brisbin v. Huntington, supra*; *Davenport v. Davenport* (1906), 116 La. 1009, 41 South. 240, 114 Am. St. 575, 579; 3 R. C. L. 774.

We have indicated above that such words as "child," "children," "descendants," and the like, as used in such statutes as §§2990, 2991, *supra*,

4. *prima facie* refer to legitimates. It is therefore evident that appellant here did not inherit from Mahala H. Wilson on her decease as her legitimate descendant; that is, *prima facie*, after the application of §3000, *supra*, appellant does not come within the beneficial provisions of §2991, *supra*.

As we have indicated, the predecessor of §3000, *supra*, was enacted in 1853. The latter section in 1901 (Acts 1901 p. 288). At each of these times §2998, *supra*, was in force, it having been enacted in 1852. A similar statute had been in force for many years (see R. S. 1831 p. 208). We have hereinbefore set out §2998. Under such statute it is held that an illegitimate inherits not only from, but through, the mother. *Parks v. Kimes* (1885), 100 Ind. 148; *Croan v. Phelps* (1893), 23 L. R. A. 753, note, subject, how-



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ever, to construction. See *Jackson v. Hocke*, *supra*. Section 2998, *supra*, it will be observed, contains the express words, "through the mother," by virtue of which an illegitimate may inherit from an ancestor through the natural mother. This section, as we have said, was in full force when §3000, *supra*, and its predecessor were enacted. In such latter sections equivalent words are not found; thus §3000, *supra*, contains no language expressly to the effect that an illegitimate child may inherit by representation through the putative father. The omission of any such provision is at least significant, especially in view of the language of §2998, *supra*. The language of §3000, *supra*, is to the effect that the illegitimate may inherit the putative father's estate and be deemed and taken to be his heir, under the circumstances outlined. We are therefore forced to the conclusion that appellant on the decease of the mother of his putative father, intestate, inherited no part of her estate. See the following. *Hicks v. Smith* (1894), 94 Ga. 809, 22 S. E. 153; *Safford v. Houghton's Estate* (1876), 48 Vt. 236. See, also, *Merritt v. Morton*, *Admx.*, *supra*, and note. Judgment is affirmed.

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W. T. RAWLEIGH COMPANY v. HUGHES ET AL.

[No. 9,872. Filed January 28, 1919. Rehearing denied May 8, 1919.]

1. **APPEAL.—Questions Reviewable.—Briefs.**—Under Rule 22 of the Appellate Court, requiring that appellant's brief be so prepared that all questions presented by the assignment of errors can be determined by an examination of the brief, without resort to the transcript, the court on appeal cannot review the overruling of a demurrer, where it is not stated or shown in the brief that any specific objection or memorandum was filed with the demurrer. p. 129.

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2. *APPEAL.—Questions Reviewable.—Ruling on Demurrer.—Failure to Take Exception.*—The overruling of a demurrer cannot be reviewed on appeal, where no exception to the ruling was taken. p. 129.
3. *APPEAL.—Questions Reviewable.—Failure to Take Exceptions.*—The action of the trial court overruling a motion to strike out the name of a party defendant, and in denying a motion to strike out paragraphs of answer, cannot be reviewed on appeal, where no exceptions are shown to have been taken to such rulings. p. 129.
4. *APPEAL.—Questions Reviewable.—Briefs.*—The trial court's ruling on a motion to strike out paragraphs of answer cannot be reviewed, where the motion is not set out in the brief. p. 129.
5. *APPEAL.—Questions Reviewable.—Briefs.*—The ruling of the trial court denying a motion for new trial cannot be reviewed on appeal, where appellant, although indicating where the motion can be found in the record, fails to set it out in its brief. p. 130.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by the W. T. Rawleigh Company against Chameron C. Hughes and others. From a judgment for plaintiff, it appeals. *Affirmed.*

*Hall & Pell* and *John E. Sedwick*, for appellant.

*S. C. Kivett* and *Miller & White*, for appellees. •

McMAHAN, J.—This is an action by the appellant on a contract of guaranty executed by appellees Hughes, Sedden and Moran, in which they guaranteed the honest and faithful performance by appellee Jacob Richardson of a certain contract entered into by him and the appellant. The complaint was for alleged damages sustained by the appellant by reason of the failure of Richardson to pay for merchandise alleged to have been purchased by him of appellant under such contract. Trial by jury, verdict and judgment in favor of appellant in the sum of one dollar.

The errors assigned and relied on for reversal are:  
“(1) The court erred in overruling appellant's demurrer to the fourth and fifth paragraphs of answer

of the defendants Chameron C. Hughes, William E. Sedden and Walter J. Morgan. (2) The court erred in overruling appellant's motion to strike out the name of Jacob Richardson as party defendant. (3) The court erred in overruling appellant's motion to strike out the first, second and third paragraphs of answer of Jacob Richardson. (4) The court erred in overruling appellant's motion for a new trial."

The first assignment of error presents no question for our decision.

The appellant has not stated or shown in its briefs that any specific objection or memorandum was filed with its demurrer on which this assignment of

1. error is based. It has been repeatedly held that Rule 22 requires that appellant's brief be so prepared that all questions presented by the
2. assignment of errors can be determined by an examination of the brief, without looking at the transcript. Not only has the appellant failed to set out in its brief the memorandum, if one was filed, but it does not appear that any exception was taken to the action of the court in overruling the demurrer. *Wenger v. Clay Tp.* (1916), 61 Ind. App. 640, 112 N. E. 402.

The second and third assignments of error present no question, as no exception is shown to have been taken to the ruling of the court in overruling

3. appellant's motion to strike out the name of Richardson as party defendant, or in refusing to strike out the first, second and third para-
4. graphs of his answer. The motion to strike out the answers is not set out in the brief as the rules of the court require, so no error is shown, even though an exception had been taken.

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U. S. Fidelity, etc., Co. v. Elliott—70 Ind. App. 130.

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This brings us to the fourth and last assignment of error. Appellant contends that the court erred in overruling its motion for a new trial, but has

5. wholly failed to set out this motion in its brief, although we are told where we can find it in the record, and for our further enlightenment we are told that at a later date this motion was overruled and exception reserved, but no information is given us as to where such action and ruling can be found in the record. It is impossible for this court to determine from appellant's briefs, without resort to the record, whether the ruling on the motion for a new trial is correct or not, and this the court has repeatedly declined to do. *Gray v. Blankenbaker* (1918), 68 Ind. App. 558, 121 N. E. 84; *Keeley v. Bradford* (1916), 62 Ind. App. 683, 113 N. E. 748; *Harrold v. Whistler* (1916), 60 Ind. App. 504, 111 N. E. 79.

Judgment affirmed.

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UNITED STATES FIDELITY AND GUARANTY COMPANY v.  
ELLIOTT ET AL.

[No. 9,837. Filed May 9, 1919.]

SCHOOLS AND SCHOOL DISTRICTS.—*Erection of School House.—Payment of Materials.—Assignment by Contractor.—Release of Surety.*—Where a contractor for the construction of a school building, in alleged violation of his contract with the surety, assigned a future payment under the building contract to pay the claim of a materialman, and the surety, with knowledge of such assignment, took over and completed the contract on the contractor's failure, the surety was estopped from claiming that such assignment released it, the surety's conduct under the circumstances constituting a ratification of the assignment.

From Henry Circuit Court; *Fred C. Gause*, Judge.

Action by the school towns of Middletown and Fall Creek township against Howard C. Elliott, the United States Fidelity and Guaranty Company and others. From the judgment rendered, the defendant guaranty company appeals. *Affirmed.*

*Barnard & Brown, Pickens, Moore, Davidson & Pickens and Douglass Morris*, for appellant.

*Forkner & Forkner*, for appellees.

NICHOLS, J.—The appellees, the school towns of Middletown and of Fall Creek township in Henry county, entered into a contract with appellee Howard C. Elliott for the construction of a joint high school building. The appellant became surety on the contractor's bond to save the school corporations from any loss resulting from the breach by the contractor of the terms and conditions of the contract.

The contract provided that the work should be done under the direction of the architect employed by the school corporations, that payment should be made "only upon certificate of the architect," and that the school corporations should pay eighty-five per cent. of the value of the labor and materials monthly as the work progressed, and the balance within thirty days after the completion of the building. The contractor failed to carry out his contract, and left the work unfinished. In order to avoid a reletting of the contract, the appellant, with Elliott and the school corporations, entered into a written agreement as follows:

"For the consideration hereinafter named, the within Howard C. Elliott assigns and transfers all his rights and interests in the contract to the United States Fidelity and Guaranty Company of Baltimore, Maryland, and said company in

consideration of said assignment assumes said contract and without waiving any claims it may have against said Elliott, agrees to perform the said contract in all particulars, and agrees to protect the school town of Middletown and the trustee of Fall Creek School Township, Henry County, Indiana, from material and labor claims now unpaid, and such as shall accrue in the course of the construction and completion of said building, and from all liability thereon. And in consideration of the foregoing assignment and agreements the said school town and school township agree to permit the said Guaranty Company to complete the same and pay the balance of the contract price, under this contract, as it shall become due under proper estimates of the architect. The building to be completed by August 1, 1915. Dated at Middletown, Indiana, January 18, 1915."

This action was commenced by said school corporations against the appellee Elliott and seventeen others, including the appellant, for an accounting among the parties, for an adjudication of claims asserted by certain appellees, who were materialmen, subcontractors and laborers, against the funds held by the plaintiffs to pay for the erection of said building, and to determine a controversy between the plaintiffs and appellant as surety of said Elliott, growing out of the payment by plaintiffs of funds claimed by appellant of \$2,000 to the Citizens State Bank, a creditor of Elliott. This payment to the bank is the only question involved in this appeal. The appellant claims that this payment was not authorized by the contract and bond, nor justified by law.

The appellant, after taking over the work, completed the building to the satisfaction of the architect, and the school corporations thereupon accepted it. The complaint, after setting out the above facts, further alleged that the entire cost of the building was \$45,841; that the plaintiffs before suit had paid \$35,322 on partial estimates upon claims for labor, material, and to the contractor and upon orders and assignments given by him, and that plaintiffs were ready and willing to pay to the parties entitled thereto, upon proper adjudication, any other additional sum that might be found or decreed by the court upon a final hearing. Then followed a schedule of claims remaining unsettled, aggregating \$8,359.38, about which there was no controversy, and which were all paid before this appeal was taken.

The plaintiffs, on motion of appellant, filed a bill of particulars which showed payments on architect's certificates numbered 1 to 9 aggregating \$33,212.29, and also a payment on an "assignment to Citizens State Bank of Newcastle, Indiana, dated October 14, 1914, for \$2,000."

Appellant filed an answer, the material part of which alleged that the said payment of \$2,000 to the bank was made after the acceptance of the building and with and after notice that the same was not properly chargeable against appellant as surety on said bond or by reason of any contract relations or lawful obligations, and was a voluntary payment for which appellant was not answerable; and that said payment was not made under the direction or by the authority of the architect, as was required by the contract between plaintiffs and the contractor. It was also alleged that when said \$2,000 was so paid plaintiffs

did not owe appellee Elliott anything on the contract; that Elliott was in default in the performance of his contract in a sum exceeding \$10,000 and owed the plaintiffs more than \$2,000 on that account, and asked that the said school corporations be required to pay the appellant the said sum of \$2,000.

Appellant filed a cross-complaint setting up the same facts and asking for affirmative relief and for judgment against Elliott in the sum of \$15,000.

The cause was submitted to the court for trial with the agreement that the court should determine the rights of all the parties without further pleadings.

The court found against the appellant upon its contention that said \$2,000 was wrongfully paid to said bank, and a decree was rendered accordingly.

The further facts relative to the payment of said \$2,000 are in substance as follows: On October 14, 1914, the contractor Elliott went to the Citizens State Bank to borrow \$2,000 for the purpose of paying for material and labor used in the construction of said building. The bank would not advance him the money on his own responsibility, but agreed with him that, if he would make an assignment of \$2,000 of the proceeds coming to him on his building contract and get the school corporations to accept the assignment, the bank would give him credit for \$2,000. This was done, the said assignment and acceptance being in writing and dated October 17, 1914, the acceptance providing that out of the next money paid to the contractor the plaintiffs would issue their check to the bank for said \$2,000.

The bank thereupon gave the contractor credit for \$2,000, and the contractor gave his check for \$1,943.50 to a materialman for material. Said check was pre-



sented to the bank and paid on October 19, 1914. The balance of said \$2,000 was checked out in the regular course of business.

The appellant, having received notice that the contractor was having financial difficulties, and that it might be to its interest to investigate, sent a representative to Middletown, who investigated the matters, and was informed that the contractor had made such assignment to the bank, and that it had been accepted by the plaintiffs, and that the plaintiffs had agreed to pay said \$2,000 out of the next money coming to the contractor. This representative of appellant and the plaintiffs in their investigation on this occasion found that there were claims then outstanding against the contractor of about \$8,000, including the \$2,000 borrowed of the bank.

The appellant, not being satisfied with the application of the funds collected by the contractor, threatened to take over the contract and complete the building, as was its right under the terms of the bond, and in order to avoid this said contractor and appellant, on November 11, 1914, entered into a writing authorizing the plaintiffs thereafter to pay all moneys then due or to become due said contractor under the contract to F. A. Wisheart, as the agent of the appellant, and to said contractor jointly, said moneys to be deposited in a bank and to be checked out only by said Wisheart and Elliott jointly. This agreement was accepted by plaintiffs, and the next payment was made accordingly, after which Mr. Elliott authorized all payments to be made to Mr. Wisheart, which was done.

The materialmen were having trouble in getting pay for materials furnished, and refused to permit

any materials to be unloaded from the cars unless payments were made in advance. There was not sufficient money due under the estimate made next after the said assignment to the bank to pay the bank and to pay for the material being delivered, so the money on the next and succeeding estimates, prior to the last and final one, was used for the purpose of paying for material, and no payment was made to the bank until the final estimate was made.

The contractor failed, and, in order to avoid a reletting of the contract, appellant, on January 18, 1915, entered into the written agreement with said contractor and the plaintiffs, hereinbefore set out, whereby the contractor assigned and transferred all his rights under the contract to appellant, and appellant agreed to perform the contract and protect plaintiffs, and plaintiffs agreed to pay the balance of contract price to appellant. The appellant took over the work and completed the building according to the contract. The architect made his final estimate on August 13, 1915, showing that there was a balance of \$12,628.71 due on the contract. The plaintiffs then accepted the building, and on August 23 filed the complaint in this cause. After the complaint was filed and before the trial plaintiffs paid the said \$2,000 to the bank.

It is appellant's contention that the acceptance of the assignment from the contractor to the bank and the payment to the bank constituted a material departure by the plaintiffs from the terms of the building contract, and, being made without the consent of appellant, released it as surety on the contractor's bond.

It is not necessary for us to determine what effect the acceptance of said assignment might have had

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upon the liability of appellant. The appellant was fully advised that this assignment had been made, and that the plaintiffs had accepted same. When it learned of this, if it thought that the action of the plaintiffs in accepting such assignment released it as surety, it had the legal right to stand upon the terms of the contract and permit the contract to be declared forfeited, and to permit the plaintiffs to relet the contract, or it might waive its right to claim a release and take over the contract and complete the building as it had a right to do under the terms of the contract. With knowledge of all the facts, appellant elected to take over the contract and complete the building rather than to have the plaintiffs relet the contract. Having done so, appellant is estopped from claiming that it was released as surety. The decision of the court was clearly correct.

The appellant, by taking over the contract and completing the building, ratified the acts of plaintiffs. *Crim v. Fleming* (1890), 123 Ind. 438, 24 N. E. 358.

There was no error in overruling the motion for a new trial.

Judgment affirmed.

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INDIANAPOLIS AND CINCINNATI TRACTION COMPANY v.  
HELMS, ADMINISTRATRIX.

[No. 9618. Filed December 18, 1918. Rehearing denied May 9, 1919.]

1. CARRIERS.—*Injuries to Prospective Passenger.—Doctrine of Assumed Risk.—Applicability.—Contributory Negligence.*—In an action against a carrier for the death of a prospective passenger, who was struck at a street crossing by one of defendant's inter-

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urban cars, the doctrine of assumed risk has no bearing, although the facts which might lead to its invocation in an action between master and servant may affect the issue of contributory negligence. p. 142.

2. **APPEAL.**—*Review.*—*Overruling Demurrer.*—*Scope of Review.*—*Statute.*—Where the issue of contributory negligence is not mentioned in memorandum accompanying the demurrer to the complaint, it need not, under the terms of §344 Burns 1914, Acts 1911 p. 415, be considered in passing upon the sufficiency of the pleading. p. 142.
3. **NEGLIGENCE.**—*Contributory Negligence.*—*Questions for Jury.*—While every person must use due care for his own safety when exposed to danger, and his failure to do so, or his conduct in negligently subjecting himself to peril, will ordinarily defeat a recovery for resultant injuries, yet, unless his conduct is so clearly marked by a failure to use proper care for his own safety that all reasonable minds will agree as to his imprudence, the question of contributory negligence must be submitted to the jury to be determined as an issue of fact. p. 143.
4. **CARRIERS.**—*Injuries to Prospective Passenger.*—*Contributory Negligence.*—*Municipal Ordinance.*—*Assuming Compliance.*—One waiting at a street intersection to board defendant's interurban car as a passenger had the right to assume that such car would obey a municipal ordinance requiring it to stop in response to the customary signals, and his further conduct in attempting to cross the track ahead of the approaching car must be considered in the light of such assumption. p. 143.
5. **APPEAL.**—*Review.*—*Verdict.*—*Evidence.*—*Sufficiency.*—In an action for wrongful death, where the sufficiency of a paragraph of complaint based on the last clear chance doctrine was not seriously challenged, and there was evidence to sustain its allegations, the verdict for plaintiff must be upheld as against defendant's contention that decedent's injury was proximately caused by his own negligence, there being evidence tending to sustain each of the other paragraphs of the complaint. p. 144.
6. **APPEAL.**—*Review.*—*Refusal of Instructions.*—It is not reversible error to refuse requested instructions which, in so far as they properly state the law, are covered by other instructions given. p. 144.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by Alice Helms, administratrix of the estate of Charles Helms, deceased, against the Indianapolis

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and Cincinnati Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Joseph R. Morgan, Kittenger & Diven and Albert S. Diven*, for appellant.

*Wilson & Wilson*, for appellee.

HOTTEL, J.—Appellee, as administratrix of the estate of her deceased husband, Charles Helms, instituted this action to recover damages for his alleged wrongful death as the result of being struck by one of appellant's interurban cars. She recovered a judgment in the trial court, and, on this appeal therefrom, appellant assigns error in the overruling of its demurrer to each of appellee's three paragraphs of complaint and in overruling its motion for a new trial.

The first paragraph of complaint alleges in substance that on the day of decedent's injury and death appellant was operating an interurban line between the cities of Shelbyville and Indianapolis, which entered the latter city through the southeastern portion thereof and passed over and along Prospect street in said city in an easterly and westerly direction; that said Prospect street is intersected by Earhart street, which passes north and south through said portion of Indianapolis, and at said intersection appellant, on the day in question and long prior thereto, maintained a regular stopping place for the reception and discharge of passengers; that on the morning of his injury, at an early hour, appellee's decedent went from his home toward the intersection of Prospect and Earhart streets for the purpose of becoming a passenger on one of appellant's cars which was inbound toward the city of Indianapolis; that said car was slightly ahead of time, and when said Charles

Helms got to the south side of Prospect street, immediately across the tracks from the regular stopping place of said inbound car, and across the tracks from the regular and proper spot from which to board said car, said car was approaching from the east, but still about 200 feet away; that it was before daylight and dark; that a man was standing in the middle of the inbound track at the regular stopping place striking matches and holding them up in order to signal said car to stop; "that such method was the customary and proper method of signaling said car to stop during the season of the year when it was still dark at that hour; that defendant had no regular lighting appliance for the purpose of signaling said car; that it had long been the custom for said car to be signaled by lighted matches, which facts plaintiff's decedent and defendant well knew; that said Charles Helms saw the man signaling said car to stop and supposed it would stop at its regular stopping place as usual, and started to walk across said tracks to the north side thereof for the purpose of boarding said car when it did stop; that he started to walk across the inbound track immediately west of the place where the car was accustomed to come to a full stop; that from his position he could not tell the rate of speed at which said car was running. "That said stopping place is within the corporate limits of Indianapolis; that one of the express conditions of the city ordinance under authority of which defendant company is operating cars in the city of Indianapolis, and which ordinance constitutes a written contract between defendant and said city of Indianapolis, and did on all times herein mentioned, is condition number one which reads in part as follows:

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“ ‘That after entering the city of Indianapolis, all regular passenger cars of said company, party of the second part, shall stop at all intersecting streets on signal from waiting passengers, or passengers on such cars desiring to leave the same, and shall take on and carry all passengers desiring to take passage on any such cars for the purpose of being transported between different points on the line from which said cars are operated in said city.’

“That said condition is section 2216 of the laws and ordinances of the city of Indianapolis, Revision of 1904. That defendant’s motorman operating said car negligently approached said stopping place at a high and unlawful rate of speed, to wit, twenty-five miles an hour, and negligently and carelessly failed to watch for and see the above described signals for stopping the car, or, if he did see them, negligently disregarded them and negligently and carelessly and unlawfully ran said car at the rate of twenty-five miles an hour past said stopping place; that said car struck said Charles Helms immediately west of said stopping place as he was crossing said track as above described and killed him instantly through no fault of his own, and while he was using due care in crossing said tracks.”

The second paragraph of complaint contains substantially the same averments as above, with the further allegation: “That said Charles Helms saw the man signaling said car to stop and supposed it would stop at its regular stopping place as usual and started to walk across said tracks to the north side thereof for the purpose of boarding said car when it did stop; that just before he reached the south or outbound track one of defendant’s outbound cars passed going

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east and as he proceeded to cross the south-bound track said outbound car obstructed his view of both tracks to the east and temporarily made it impossible for him to see said car approaching from the east; that he had started to cross the tracks at a point west of the regular stopping place and at a point safe for him to cross had the car stopped in response to the signals; that from his position, when he last saw the approaching car, he was not able to judge the rate of speed at which it was approaching.”

The third paragraph of complaint does not differ materially from the second in its allegations of fact, except in so far as it alleges that Helms crossed the south track in front of the outbound car and then found himself placed in a position of danger on the inbound track on account of appellant’s negligence as above set forth. The evident theory of this paragraph is that appellant had the last clear chance to avoid the injury.

In its attack on the complaint appellant contends in substance that the facts therein alleged serve to show that appellee’s decedent assumed the risk

1. of his injury and was guilty of contributory negligence, and fail to show any negligence on the part of appellant in the operation of its
2. car. The doctrine of assumed risks has no bearing on actions of this character, although the facts which might lead to its invocation in an action between master and servant may, in other cases, affect the issue of contributory negligence. The latter issue, however, is not mentioned in the memorandum filed with appellant’s demurrer to the complaint, and, under §344 Burns 1914, Acts 1911 p. 415, it need not be considered in passing on the sufficiency



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of the pleading. In substance, however, the same question is presented by appellant's contention that the evidence does not sustain the verdict of the jury, on the theory that decedent's injury was the proximate result of his own negligence in attempting to cross the track in front of the moving car, and we will proceed to its consideration under that assignment.

It is true that every person must use due care

3. for his own safety when exposed to danger, and his failure to use such care, or his own conduct in negligently subjecting himself to peril, will ordinarily defeat a recovery for resultant injuries, but, unless his conduct is so clearly marked by a failure to use proper care for his own safety that all reasonable minds will agree as to his imprudence, the question of contributory negligence on the part of the injured person must be submitted to the jury in every instance, to be determined as an issue of fact. *Indiana Union Traction Co. v. Cauldwell* (1915), 59 Ind. App. 513, 516, 107 N. E. 705; *Lake Erie, etc., R. Co. v. Oland* (1912), 49 Ind. App. 494, 499, 97 N. E. 543.

It is the theory of appellee's complaint, at least of the first two paragraphs, that Helms was justified in

assuming that appellant's car would obey the

4. municipal ordinance which required it to stop in response to the customary signals, and that he would incur no danger in crossing the tracks west of the stopping place. Decedent's right to act on that assumption is sustained by the authorities, and his further conduct is to be considered in the light thereof. *Indianapolis Traction, etc., Co. v. Hensley* (1917), 186 Ind. 479, 115 N. E. 934, 939; *Indiana Union Traction Co. v. Cauldwell, supra*, 516.

The third paragraph impliedly admits antecedent negligence on the part of the injured man, but charges in substance that appellant's employes might

5. thereafter have averted the accident but for their negligent and continued operation of the car at an unlawful rate of speed and in violation of the municipal ordinance. The sufficiency of the third paragraph of complaint, on this theory, is not seriously challenged, and there is evidence from which the jury might have concluded that its allegations are well founded. Similarly, there is evidence which tends to sustain each of the other paragraphs, and, in that view of the record, the verdict of the jury must be upheld. Our conclusions relative to the evidence are sufficient also to dispose of appellant's contentions with reference to the demurrers to the complaint.

The remaining questions relate to the giving of appellee's instructions Nos. 9, 10 and 11, and to the refusal of appellant's tendered instructions

6. Nos. 1, 3, 4, 5, 6, 7 and 8. In the preparation of its brief appellant has failed to set out any of the twenty-eight instructions given to the jury, except the three to which objection is urged, but an examination of the record discloses that the instructions tendered by appellant, in so far as they properly state the law, were covered by other instructions given.

Appellee's instructions Nos. 9, 10 and 11 are not subjected to specific criticism, and we see nothing which sustains appellant's general assertion that they contain error.

Judgment affirmed.

**MICHIGAN CENTRAL RAILROAD COMPANY v. KOSMOWSKI.**

[No. 9,689. Filed January 28, 1919. Rehearing denied May 9, 1919.]

1. **APPEAL.—Assignment of Errors.—Matters Assignable.—Refusal to Direct Verdict.**—Errors assigned on the refusal of the trial court to direct a verdict present no question for review on appeal. p. 147.
2. **RAILROADS.—Crossing Accidents.—Complaint.—Sufficiency.—Contributory Negligence.**—In an action against a railroad for injuries sustained by the driver of a wagon in a crossing accident, complaint containing general averment of freedom from fault on the part of plaintiff, *held* sufficient against the objection that it showed plaintiff to have been guilty of contributory negligence. p. 153.
3. **RAILROADS.—Crossing Accidents.—Complaint.—Sufficiency.—Proximate Cause.**—In an action against a railroad company for injuries sustained by a wagon driver in a crossing accident, complaint containing allegation that plaintiff was injured by reason of defendant's negligence in running its train in violation of a speed ordinance and in failing to sound whistle or bell, *held* sufficient as against the objection that defendant's negligence is not shown to be the proximate cause of the injury. p. 153.
4. **RAILROADS.—Crossing Accidents.—Contributory Negligence.**—Where the driver of a team and wagon approached a railroad crossing at the speed of three miles an hour, but, though looking carefully, was unable, because of the numerous headlights, switchlights, etc., to discover a train approaching at a speed of seventy miles an hour until his horses were about to enter on the track, when he attempted to stop the horses and back them out of danger, but failed because they suddenly lunged forward and across the track, he was not, as a matter of law, negligent. p. 154.
5. **APPEAL.—Review.—Refusal to Direct Verdict.**—In an action against a railroad for injuries sustained in a crossing accident, instructions directing a verdict for defendant were properly refused where it was clearly established that the train at the time of the accident was running at a much greater speed than allowed by municipal ordinance, and where, under the evidence, the question of plaintiff's negligence and proximate cause was for the jury. p. 154.
6. **RAILROADS.—Crossing Accidents.—Action.—Instructions.—Ignoring Issues.**—In an action against a railroad for injuries to person and property sustained in a crossing accident, requested instructions. 70—10

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- tions omitting the element of injury to plaintiff and limited to the damage to property were properly refused. p. 155.
7. RAILROADS.—*Crossing Accidents.*—*Contributory Negligence.*—*Burden of Proof.*—In an action against a railroad for personal injuries sustained in a crossing accident, plaintiff did not have the burden of showing want of due care on the part of defendant. p. 155.
  8. RAILROADS.—*Crossing Accidents.*—*Negligence.*—*Violation of Speed Ordinance.*—*Instructions.*—In an action against a railroad for injuries sustained in a crossing accident, an instruction that the operation of a train at a rate of speed forbidden by city ordinance was “ordinarily” negligence was properly refused, since the violation of an ordinance is negligence *per se*. p. 155.
  9. RAILROADS.—*Crossing Accidents.*—*Contributory Negligence.*—*Instructions.*—In an action against a railroad for injuries to person and property sustained in a railroad crossing accident, an instruction relating principally to the subject of damage to property, but telling the jury that plaintiff was required to prove that the damage occurred without any fault or negligence on his part, was correctly refused as being misleading, the instruction not being limited to a recovery for personal property. p. 155.
  10. APPEAL.—*Review.*—*Instructions.*—*Invited Error.*—Appellant cannot complain that instructions were erroneous as not being warranted by the evidence, where such instructions were invited by others on the same subject tendered by appellant. p. 156.
  11. RAILROADS.—*Crossing Accidents.*—*Action.*—*Evidence.*—In an action against a railroad for injuries sustained in a crossing accident, evidence that the engines of defendant railroad and those belonging to another railroad using the same track had both the names of a railroad system and the initials of the railroad to which they belonged painted on them, was admissible under an allegation that such railroads were being operated under the system named on defendant's engines. p. 156.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Stantislaus Kosmowski against the Michigan Central Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Winston, Payne, Strawn & Shaw, L. V. Cravens, Edward W. Everett and Ibach, Gavit, Cravens & Stinson*, for appellant.

*Crumpacker & Crumpacker*, for appellee.

McMAHAN, J.—This action was brought by the appellee to recover damages for injuries to his person, and to certain personal property, alleged to have been received on account of a collision between one of appellant's locomotives and appellee's horses and wagon.

The complaint originally consisted of two paragraphs. A demurrer for want of facts, filed to this complaint as a whole, was overruled, and exception reserved by appellant.

Later appellee filed an amended first paragraph of complaint and also a third paragraph of complaint. A separate and several demurrer for want of facts was then filed to said amended first paragraph and to the third paragraph of complaint. Answer filed, trial by jury, followed by a verdict for appellee. Motion for a new trial, filed by appellant, was overruled, and was followed by a judgment for appellee.

The errors assigned are six in number. The first and third are waived. The fourth and fifth relate to the refusal of the court to direct a verdict,

1. and for that reason present no question. The second error assigned challenges the action of the court in overruling appellant's demurrers to each paragraph of complaint, while the sixth is that the court erred in overruling appellant's motion for a new trial.

The complaint in this case is very lengthy. The amended first paragraph alleges that the appellant is, and for years has been, a corporation operating a line of railway from Chicago, Illinois, to the city of Detroit, Michigan, and passing easterly through the city of Hammond, in Lake county, Indiana; that in the eastern part of Hammond it crosses Kennedy

avenue, a public street, at right angles; that about 300 feet west of said crossing is a depot, roundhouse and railroad yards, which are used by the appellant in conjunction with the Chicago, Indiana and Southern Railway Company and the Indiana Harbor Belt Railroad Company; that these three railroad companies, for more than five years, had been operating their railroads in conjunction with each other under a system known as the New York Central Lines; that the roundhouse had stalls for about thirty-five engines, with windows in the front part and in front of the engines; that the said three railroads constantly run engines in and out of this roundhouse, night and day, and that in so doing the engines throw a strong light through the windows so they can be plainly and distinctly seen at said crossing and south along said highway for several hundred feet; that the railroad yards extend westward two and a half miles along the south side of appellant's main line, there being about fifty parallel tracks in said yards and which are used for switching purposes and in making up trains for all the several railroads; that engines are being constantly used in said yards, and that the headlights thereon can be plainly seen at said Kennedy avenue crossing and for a distance of a quarter of a mile south thereof; that there is another and secondary railroad yard running from said station southwesterly to another station about one mile and to the Chicago, Indiana and Southern Railroad; that there are many boarding and lodging houses, hotels and repair shops near said station, and that 1,500 men are employed in and around said yards and shops; that there is along the appellant's railroad, and commencing about 200 feet west of Kennedy avenue, at and

around said station and switchyards and extending westward two and a half miles, a labyrinth of switch lights, head lights, signal lights and semaphore lights, which constantly reflected their lights in almost every direction; that the main line of the Chicago, Indiana and Southern Railroad crossed the main line of appellant at an acute angle at a point about 500 feet west of Kennedy avenue; that the Belt Railroad uses the main line of said Chicago, Indiana and Southern Railroad across the appellant's line, and that many engines run over and across the said crossing during the night, and that a traveler on said Kennedy avenue can scarcely distinguish between a headlight on appellant's main line and a headlight on the railroads crossing appellant's line, or from the head lights in the switchyards, or from engines in the roundhouse; that Kennedy avenue at that point had, for years, been the main traveled highway from Chicago, Illinois, Whiting, Indiana Harbor and East Chicago to the south, and also was the only direct route between Chicago and the city of Gary, and was much used by the public both day and night, and had been so used with the knowledge of appellant for more than five years; that appellant's crossing target and switch-house is within 500 feet of said street crossing and in plain view of the same, and has for years been occupied and operated by appellant's servants both day and night; that no lights were maintained by appellant or by the city of Hammond at said crossing; that when the headlights shone from the west, they lighted said Kennedy avenue crossing so that the appellant's employes in charge of and operating the target at the railroad crossing could see a person, team, or wagon approaching from the south on Kennedy avenue a distance of 100 feet.

Plaintiff alleges that about one o'clock at night he was traveling north on said street with a team of horses and a wagon, and, when about ninety feet south of said crossing, he saw several headlights to the west and southwest, which seemed to be approaching; that he was not very well acquainted with the locality, and stopped his team to look and observe the surroundings and approaching danger, if any; that some of the headlights seemed to be receding westerly, some stationary, and some coming toward the east; that one was on an engine attached to a freight train that was crossing the defendant's main line on the Chicago, Indiana and Southern track; that this freight train made much noise, and whistled several times, and that the engines operating in the yards occasionally whistled; that the headlights and other lights near said crossing lighted the same so that the appellant's railroad could be plainly seen by plaintiff at said crossing, and that the plaintiff's horses and wagon could be plainly seen from the target house of the appellant, which was located a short distance west of Kennedy avenue; that said freight train when crossing appellant's main line shut out the light and view to the westward thereof along appellant's tracks; that appellee looked both ways, up and down the appellant's tracks, but did not see nor hear any train or engine or cars approaching Kennedy avenue crossing, and that he could not see and did not know of the approach of any, and believing it was safe for him to cross, proceeded north along said street; that when he reached a point about forty to forty-five feet of the appellant's track, he looked to the west and the freight train had not yet entirely crossed over appellant's railroad, and that he then turned and



looked east to see if any train was coming from that direction, and that he could not see nor hear any on appellant's tracks, and did not know any was approaching; that while he was so looking and listening his team of horses and wagon in which he was riding was approaching appellant's railroad at said crossing, and that as his horses were about to enter on the said railroad track he again looked to the west and saw an engine and a train of cars approaching from the west on appellant's tracks, and which seemed to be several hundred feet away and coming toward him; that he could not judge of its speed but believed it was going much slower than it really was; that at this time he attempted to stop his horses and back them out of danger, but that they suddenly lunged forward and the train was approaching at such lightning-like speed that he did not realize his danger until it was on him, and he could do nothing to avert the danger and injury, and that until the train got very near to him he could not see and did not realize that it was going at a speed of seventy miles an hour; that plaintiff, until his horses started with a lunge, was going at a speed of no more than three miles an hour; that he could not hear the approach of the train on account of the noise of other engines, etc., and that he did not and could not, by the exercise of ordinary care, discover and know appellant's headlight on the approaching train, or that appellant's train that struck him was coming at such high speed, but that he believed it would run its train within the limits prescribed by the ordinance of the city of Hammond, and according to the laws of Indiana.

It is further alleged that the appellant did not ring the bell nor sound the whistle as the train approached

the crossing, and did not give any notice of the approach of the train; that appellant's servants in charge of said train could and did see plaintiff and his perilous position, at a point when they were 800 feet west of said crossing, and that the agents of the appellant in the target house 500 feet west of said crossing could and did see him and his horses from the time he was 100 feet of the crossing and until he was struck, and that such agents in the target house could and did see the train that struck appellee from a point one-half mile west of said crossing to the time it struck him, and that such servants, by exercising due care, could have prevented appellee being injured; that the persons in charge of appellant's said engine and train saw, or, by the use of due diligence, could and might have seen, plaintiff and his perilous position and danger to him in time to have slackened and slowed down said engine and train and avoided any injury to plaintiff, but that they negligently failed to do so, and that the servants in said target house failed to use due diligence in that behalf.

It is also alleged that there was an ordinance in force in the city of Hammond limiting the speed of all railroad trains to a speed of not over six miles an hour, and that appellant was running its train in violation of such ordinance by running it over seventy miles an hour, and that the injury and damages complained of would not have occurred if appellant had run its train according to the provisions of said ordinance; that, if appellant had run its engine and train in accordance with said city ordinance, it might and could have stopped the same, and the injury to plaintiff and his property would not have occurred; that the appellant recklessly and negligently failed to comply with said ordinance and to put said engine and

cars under proper control; that the said train struck the appellee's horses and wagons and injured him and killed his horses and damaged his wagon; that he was not guilty of contributory negligence, but that the injuries and damages were caused wholly on account of the negligence of appellant, and prays judgment for the alleged injuries to his person and personal property.

The third paragraph is, to all intent and purpose, the same as the first.

The second paragraph, although much shorter and more concise than the other two paragraphs, contains about the same allegations, except that nothing is alleged as to the plaintiff's perilous position.

The sufficiency of each paragraph of the complaint is challenged on the theory that plaintiff is shown to have been guilty of contributory negligence, 2-3. and because the negligence of the appellant is not shown to be the proximate cause of the injury. Neither of these objections can prevail.

Each paragraph of complaint contains a general allegation of freedom from fault on the part of the appellee, and that he was injured by reason of the negligence of appellant in running its train in violation of the speed ordinance and in failing to sound its whistle or bell, and that, in addition to the injury to his person, his property was also injured and destroyed. An allegation of this character, when nothing is shown by specific averment which negatives or destroys its effect, has always been held sufficient in this state. *Baltimore, etc., R. Co. v. Young* (1896), 146 Ind. 374, 45 N. E. 479; *Delaware, etc., Tel. Co. v. Fleming* (1913), 53 Ind. App. 555, 102 N. E. 163.

In addition to the foregoing objections the appellant also contends that the demurrer to the amended first and to the third paragraphs of complaint should have been sustained, because the negligence of the appellant and the appellee was concurrent, and also because the act of the engineer in running the train in excess of the speed ordinance preceded the negligent act of the appellee in getting in a perilous position.

In so far as the additional objections are concerned, it is sufficient reply to say that neither of these paragraphs disclose such a state of facts that the

4. court can say, as a matter of law, that the appellee was negligent, and this is true whether the rule of the last clear chance is invoked or not.

The demurrer to each paragraph was properly overruled.

Error has been assigned in refusing to give the jury certain instructions requested by appellant and in giving certain others on the court's own

5. motion. Instruction No. 1, tendered, directed a general verdict for appellant, while Nos. 2 and 3 directed a verdict to appellant on the amended first and on the second paragraphs of complaint.

The violation of the speed ordinance was clearly established by the evidence. The engineer and fireman on the train both testified that the train, at the time of the accident, was running five or six times as fast as was authorized by the ordinance, and under the evidence the negligence of the appellee and the proximate cause was a question for the jury. The court correctly refused to give instructions Nos. 1, 2 and 3.

Instructions Nos. 7 and 46, tendered, were to the

effect that before plaintiff could recover it must appear from the evidence: First, that the defend-

6. ant was negligent in some one or more particulars alleged in the complaint; second, that such negligence wholly caused the accident; third, that plaintiff was not guilty of contributory negligence; fourth, that the plaintiff suffered damages to his property by reason of the negligence of defendant, and that the burden was on plaintiff as to all of said matters, and, if any one or more of said things is not shown by the evidence, the verdict must be for the defendant. These instructions omitted the element of injury to the plaintiff, and were limited to damage to his property, and were properly refused. Had they been confined to the second paragraph of complaint, a different question would be presented. The burden

of showing want of care did not rest with the plaintiff, in so far as the question of injury to his person was concerned. Instruction No. 10, tendered, told the jury that a rate of speed for-

8. bidden by a city ordinance was *ordinarily* negligence, and that such negligence would not excuse a person who assumes the risk of crossing in front of a train which he knows is approaching. The violation of such an ordinance is negligence *per se*. This instruction was properly refused for that reason, if not for the further reason that it omitted the element of reasonable care on the part of the plaintiff. Instruction No. 11, given by the court, correctly instructed the jury on this subject.

Instruction No. 12, tendered by appellant, is misleading. The general subject covered by it is injury to property, yet the jury is told in one part of

9. it that, "before he (plaintiff) can recover on account of injuries at a railroad crossing, he

must prove, by a preponderance of evidence, that the damage occurred without any fault or negligence on his part.” This instruction, not being limited to personal property, was correctly refused. The court fully and correctly covered this subject in the instructions given.

The appellant urges that instruction No. 33 should have been given on the theory that the target operator was not working for appellant, and therefore owed appellee no duty. This target man was called as a witness, and testified that he was working for all three of the railroads at the time of the accident. We have examined all instructions which appellant claims should have been given, and do not find any reversible error.

We have carefully examined all the instructions given by the court to which any objection is made, and think they correctly state the law, and we see no objection to any of them.

Objection is made to the giving of instructions Nos. 6 and 14, on the ground that there was no evidence introduced which authorized the court in submitting the doctrine of the last clear chance to the jury. Appellant, in tendering its instruction No. 26, invited the court to instruct on this doctrine, and is therefore not in a position to complain. *Terre Haute, etc., Traction Co. v. Frischman* (1914), 57 Ind. App. 452, 107 N. E. 296.

The only other assignment of error is that the court erred in permitting witness Murden to testify that the engines of the Michigan Central and  
11. the Chicago, Indiana and Southern Railroad Companies both had the words “New York Central Lines” on them, and that the Michigan Cen-

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tral engines also had the letters "M. C." on them, and the other company's engines had the letters "C. I. & S." on them. It will be remembered that the complaint alleged that the railroads mentioned were being operated under a system known as the New York Central Lines. This evidence was proper; the weight of it was for the jury. We find no reversible error in the record.

Judgment affirmed.

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MUNCIE FOUNDRY AND MACHINE COMPANY v. THOMPSON.

[No. 10,497. Filed May 9, 1919.]

1. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Independent Contractor.—Employee.*—A worker engaged by a foundry company to unload coke from freight cars for a stipulated sum per ton was an employee and not an independent contractor, where there was no contract fixing the number of cars to be unloaded or the period of time he was to be so employed, and he could cease labor at any time without incurring liability or could be discharged without being entitled to damages. p. 159.
2. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Findings of Industrial Board.—Sufficiency to Sustain Award.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918) the Industrial Board must find as a legal basis for an award that claimant was an employee, that he received an injury by accident, that the accident arose out of and in course of the employment, the character and extent of the injury, and claimant's average weekly wage, and a finding of facts failing to show that the injury complained of, and upon which an award is based, arose out of the employment is insufficient to sustain such award. p. 161.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Joshua Thompson

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against the Muncie Foundry and Machine Company. From an award for applicant, the defendant appeals. *Reversed.*

*Joseph W. Hutchinson*, for appellant.

*Cromer & Long*, for appellee.

ENLOE, J.—The record in this case discloses that on July 8, 1918, the appellee began working for appellant, at its plant in Muncie, Indiana, unloading coke from the freight cars in which it was shipped to the plant into the “bins” of appellant at said plant; that this coke was shoveled from the car into the hopper of a conveyor, by which it was carried and dumped into the bins; that appellee was working under an agreement at the time of his injury, by which he was to receive as compensation for his labor forty cents per ton for the coke unloaded; that prior to the time of receiving the injury complained of he had been assisted in unloading said coke by two other persons, one of whom assisted in unloading two cars, and the other person assisted on one car; that appellee had been doing this work without any help or assistance from any other person for several days before he was injured; that on July 19, 1918, appellee was at the plant of appellant unloading a car of coke, and while so at work, he observed that the conveyor had stopped, and, thinking it had become clogged, thereby causing it to stop, he opened a door thereon to investigate the matter; he found some pieces of coke on the belt, and, in attempting to remove them, his hand was caught, and he was injured; that as a result of the injury he lost the thumb on his right hand by amputation; the crushing of the bones of the hand, and a laceration of the tendons



and soft tissues thereof, all of which resulted, as found by the Industrial Board, in a "75 per cent. impairment of the natural use and function of the whole right hand"; that the average weekly wage of the appellee was in excess of \$24. The Industrial Board further found "that the plaintiff's injury was not due to any wilful misconduct upon his part, and was not in violation of any specific instruction given to him by the defendant."

A hearing was first had before one member of the board, and afterwards, on due application by appellant for review of the proceeding, a review was had by the full board, and on such hearing the board awarded compensation to appellee at the rate of \$13.20 per week, for 112½ weeks, beginning July 28, 1918, and from that award this appeal is prosecuted.

The error assigned is that the award of the full board in said cause is contrary to law.

Under this assignment the appellant urges three propositions, viz.: (1) "The finding of the full board is not sustained by sufficient evidence. The specific point to which we call the court's attention is that the full board found that appellee was in the employment of appellant, whereas in truth and in fact he was not an employe of appellant but an independent contractor."

With this contention we cannot agree. It is frequently said in the cases that "to draw the distinction between independent contractors and serv-

1. ants is often difficult and the rules which courts have undertaken to lay down on this subject are not always simple of application." See "Independent Contractor," 4 Words and Phrases 3542.

What contract, as an independent contractor, did the appellee have with appellant? How many cars must he unload at forty cents per ton before his contract would be completed? Or, during what period of time was he, under his contract, to unload cars for appellant? As to each of these questions there is no answer found in this record favorable to appellant.

Contracts are entered into for the purpose of acquiring rights on the one hand, and imposing obligations on the other. Could appellee, under the evidence in this case, as shown in this record, have quit work at any time, without incurring any legal liability to appellant? Could appellant at any time discharge the appellee without incurring any legal liability to him to respond in damages for breach of the alleged contract? To these questions, upon the record before us, we answer that there could be no such liability. The appellee could cease labor for appellant at any time he chose, and appellant had the right to discharge him at any time it chose. Appellee's pay, instead of being measured by the hour, day, week, or month, was by this contract, to be measured by the ton of coke unloaded, but he was none the less a laborer, in the employ of the appellant, doing appellant's work, at the time he received the injury in question.

Appellant next insists that the facts found are not sufficient to sustain the award, because: (1) There is no finding that the appellee was in the course of his employment at the time he received the injury upon which the award is based; and (2) there is no finding of facts which shows that the injury complained of, and upon which the award is based, arose out of the employment.

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This contention is well taken. The board is, by the statute, required to find the facts upon which it bases an award. There is not, in this case, any

2. general finding that the injury sustained by him was received by accident arising out of and in the course of the employment as servant of appellant.

In cases of this character there are five facts which must be found as a legal basis for an award of compensation, viz.: (1) That claimant was an employe. (2) That he received an injury by accident. (3) That the accident arose out of and in the course of the employment. (4) The character and extent of such injury. (5) Claimant's average weekly wage.

The cases of *Inland Steel Co. v. Lambert* (1917), 66 Ind. App. 246, 118 N. E. 162, and *Retmier v. Cruse* (1918), 67 Ind. App. 192, 119 N. E. 32, in so far as they each are at variance with the views herein expressed as to the findings to be made by said board, are hereby disapproved.

For the failure of the board to find the facts necessary to sustain its award, this cause is reversed, and remanded to said Industrial Board, with directions to restate its findings of fact, and for further proceedings not in conflict herewith.

Award is reversed.

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DEEP VEIN COAL COMPANY v. WARD, ADMINISTRATRIX.

[No. 9,754. Filed May 9, 1919.]

1. APPEAL.—Review.—Ruling on Demurrer.—Scope of Review.—Statute.—Under §344, cl. 6, Burns 1914, Acts 1911 p. 145, objections to the sufficiency of the complaint presented in appellant's

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brief, but not specified in the memorandum filed with the demurrer, cannot be considered on appeal. p. 164.

2. **TRIAL.—Incomplete Instructions.—Duty to Request Proper Instructions.**—In an action for personal injuries, an instruction that it was not necessary for plaintiff to prove any immaterial allegations of the complaint, although incomplete, is not reversible error, it being defendant's duty in such case to present and request an instruction correctly stating the issues. p. 164.
3. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Applicability.—Instructions.**—In an action for the death of a servant based on the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), an instruction that the act applied, if defendant was employing five or more men in its business, was not subject to the objection that it informed the jury that the employment of five or more men was the only prerequisite to the application of the act, where the uncontradicted evidence showed that defendant was operating a large coal mine, and employed more than 250 men in the mining and marketing of its coal, and other instructions informed the jury that there could be no recovery under the act unless it was shown by a preponderance of the evidence that the employe met his death as a result of defendant's negligence, as charged in the complaint. p. 164.
4. **APPEAL.—Review.—Refusal of Instructions.**—The refusal of requested instructions, even though they state the law correctly, is not error, where they were covered by others given by the court. p. 166.
5. **TRIAL.—Misconduct of Counsel.—Improper Argument.**—Where appellee's counsel made statements outside of the evidence in his closing argument to the jury, but the record shows that the alleged objectionable statement was made in response to remarks equally as objectionable made by appellant's counsel, such misconduct is not reversible error. p. 166.
6. **APPEAL.—Review.—Intervening Errors.—Correct Result.—Affirmance.—Statutes.**—Where there is evidence to support every material averment of the complaint, and it fully appears from the record that the cause was fairly tried and a correct result reached, the judgment will be affirmed under §§407, 700 Burns 1914, §§398, 658 R. S. 1881, regardless of error, if any, in the admission and rejection of evidence. p. 166.

From Vigo Superior Court; *Fred W. Beal*, Judge.

Action by Anna E. Ward, administratrix of the estate of William Ward, deceased, against the Deep

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Vein Coal Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Charles C. Whitlock, Albert R. Owens, Presley O. Colliver, W. B. Hess and Charles Hellison, for appellant.*

*Foley & O'Mara, Walker & Blankenbaker. and Thomas J. Roach, for appellee.*

REMY, J.—On July 12, 1911, appellee's decedent, William Ward, was in the employ of the Deep Vein Coal Company, appellant herein, in the operation of what is known as a cutting machine. The machine was run by electric power, and was used to cut under the face of the coal in the mine so as to expedite the removal of the coal. While appellee's decedent and a helper were in the line of their employment operating said machine, at a point in the mine as directed by chalk marks placed there by appellant, a large piece of rock or slate, forming the roof of the mine at said point, fell, instantly killing said decedent. This action is to recover for the death of said employe which it is claimed resulted from appellant's negligence. The complaint is based upon the Employers' Liability Act of 1911. Acts 1911 p. 145, §80201 *et seq.* Burns 1914. Separate demurrers to the three paragraphs of complaint were overruled, and the issues joined by appellant's answer in denial. A trial by jury resulted in a verdict for appellee for \$3,000. The alleged errors relied on for reversal are: (1) The action of the trial court in overruling the separate demurrers to the several paragraphs of the complaint; and (2) the overruling of the motion for a new trial.

The objections to the complaint which are presented by appellant in its brief were not specified in its

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memorandum filed with the demurrers, and

1. therefore cannot be considered on appeal. §344, cl. 6, Burns 1914, §339 R. S. 1881; *Jackson Hill Coal Co. v. Van Hentenryck* (1918), 69 Ind. App. 142, 120 N. E. 664.

Error is predicated upon the action of the court in giving to the jury on its own motion instruction No. 1, also on the giving of twenty-one several instructions at the request of appellee, and on the refusal of the court to give twelve several instructions tendered by appellant.

Instruction No. 1 given by the court on its own motion told the jury "that it is not necessary for the plaintiff in order to recover to prove any im-

2. material allegations of the complaint." The instruction in the form given is incomplete, but incompleteness in an instruction presents no reversible error. Appellant should have presented, and requested the court to give, an instruction correctly stating the issues. *Vandalia Coal Co. v. Coakley* (1916), 184 Ind. 661, 111 N. E. 426; *Jackson Hill Coal Co. v. Van Hentenryck*, *supra*.

Instruction No. 8, given by the court at appellee's request, to which objection is specially urged, is as follows: "I instruct you that if you find that

3. the Deep Vein Coal Company was employing five or more men on July 12, 1911, in its alleged business of coal mining, the provisions of the Employers' Liability Act of 1911, applies to this case."

It is urged that by this instruction the jury were told that the only prerequisite to the application of the Employers' Liability Act, *supra*, to the case was the employment of five or more men on the day of the accident without regard to whether the appellant

was engaged in business, trade, or commerce, as required by the act, and without regard to whether decedent's death resulted in whole or in part from the negligence of appellant or its representatives, or by reason of any defect, mismanagement, or insufficiency due to its negligence. There was no reversible error in the giving of this instruction. The uncontradicted evidence shows that at the time in controversy appellant was operating a large coal mine, and had in its employ in the mining and marketing of its coal employes to the number of 250 or more; and by other instructions the jury were fully informed that under the Employers' Liability Act there could be no recovery, unless it was shown by a preponderance of the evidence that appellee's decedent met his death as a result of appellant's negligence as averred in the complaint. In fact, the court read to the jury, as a part of his instructions, §§1, 2 and 3 of the Employers' Liability Act, *supra*. The jury could not have been misled by the instruction.

Objection is made to instruction No. 31, given by the court at appellee's request. This instruction told the jury that, if they found from the evidence that appellant company had in its employ certain day men whose duties were to remove loose slate and other material from the roof of that part of the mine where appellee's decedent was required to work, and where he lost his life, and that such men were in its employ at the time of, and immediately before, the accident, then the negligence of such day men was the negligence of appellant company. It is the contention of appellant that the complaint proceeds upon the theory that the only negligence charged is the negligence of the mine boss, and that it was error to charge the

jury that appellee could recover if the evidence showed that the negligence was that of fellow servants. Appellant would give to the complaint too narrow a construction. Each paragraph proceeds upon the theory that the negligence charged was the negligence of appellant. The instruction is within the issues, and the giving of it was not error.

We have examined the other instructions of which complaint is made; also all instructions tendered by appellant, and which were by the court refused.

4. The requested instructions which stated the law correctly were covered by others given by the court. The instructions given by the court when taken as a whole fairly state the law of the case.

It is claimed by appellant that a new trial should have been granted on the ground that appellee's counsel was guilty of misconduct in making a state-

5. ment outside the evidence in his closing argument to the jury. It appears from the record that the alleged objectionable statement was made in response to remarks equally objectionable which had been made by appellant's counsel. Misconduct arising under such circumstances is not reversible error. *Haskell, etc., Car Co. v. Timm* (1919), (Ind. App.) 122 N. E. 788.

Appellant asserts that the verdict of the jury is not sustained by sufficient evidence, and also complains of numerous rulings of the trial court as to the

6. admission and exclusion of evidence. We have carefully examined the evidence, and, inasmuch as there is evidence to support every material averment of the complaint, and since it fully appears from the record that the cause had been fairly tried and a correct result reached, no good purpose would



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be subverted by extending this opinion to discuss in detail the many rulings of the court on the admission and rejection of evidence. Even though we should find errors, they would have to be disregarded. *Harris v. Randolph County Bank* (1901), 157 Ind. 120, 138, 60 N. E. 1025. No rule of law is more important, and none is more binding on this court, than the rule fixed by the correct result statutes (§§407, 700 Burns 1914, §§398, 658 R. S. 1881), which requires an affirmance if it appears from the record that the decision of the trial court has resulted in substantial justice.

We find no reversible error. Judgment affirmed.

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EWART v. EWART ET AL.

[No. 10,371. Filed May 9, 1919.]

1. **WILLS.—Construction.—Intention.**—In construing a will, the primary purpose of the court is to determine, if possible, the intention of the testator as expressed therein, and to give effect thereto. p. 170.
2. **WILLS.—Construction.—Intention.—Consideration as a Whole.**—In determining the testator's intention, isolated statements or separate clauses and provisions of a will should not be considered alone, but the whole will should be taken together, and each part construed with relation to the language used in other parts and effect given to the general intention thereby ascertained. p. 170.
3. **WILLS.—Construction.—Estate Devised.—Devise with Power to Sell.**—A devise of real estate to a testator's son, "to have and to hold forever with the power to sell the same and invest the proceeds in such other property, real or personal, as he may deem best," subject to the life estate of testator's widow, creates a fee, regardless of a repugnant devise over to testator's grandchildren after the son's death. p. 171.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

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Action by Daniel Oliver Ewart against Anna B. Ewart and others. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

*J. W. Moffett*, for appellant.

*Cline & Cline and Hemphill & Roselip*, for appellee.

NICHOLS, J.—Appellee David Oliver Ewart filed his complaint in the Huntington Circuit Court against his coappellees and the appellant to quiet the title to an eighty-acre tract of land in Huntington county. The defendants, including the appellant, answered separately in general denial. There was a trial, which resulted in special findings of fact, and conclusion of law in favor of appellee David Oliver Ewart. Appellant duly excepted to the conclusion of law, and, after motion for a new trial, which was overruled, judgment was entered in favor of appellee David Oliver Ewart, quieting the title to said real estate in him in fee simple. From this judgment this appeal is prosecuted.

The only error relied upon for reversal is that the court erred in its conclusion of law rendered upon the special findings of facts.

The substance of the special findings, so far as they concern this opinion, is as follows: Mahlon D. Ewart died testate December 30, 1892, and his will was probated January 9, 1893. It contains provisions as follows: Item 1. Direction for the payment of his debts. Item 2. A devise and bequest of all his estate real and personal to his wife, Thalia T. Ewart, during her natural life. Item 3. A bequest to Samuel DeHaven of \$300. Item 4. A bequest to Caroline Lantis of \$300. Item 5. A bequest to Albert DeHaven of \$300. Item 6. A devise to appellee David Oliver

Ewart of the real estate in controversy, situate in Huntington county, Indiana, "to have and to hold forever with the power to sell the same and invest the proceeds in such other property, real or personal, as he may deem best," subject to the life estate of testator's wife, Thalia T. Ewart, "and after the death of my dear son, David Oliver, I will and bequeath the real estate herein in this item to my grandchildren, Verney Ewart, Alaska Ewart, Lloyd Ewart, and Emerson Ewart, equally and should my son David Oliver Ewart sell the real estate in this item bequeathed, he shall be deemed a trustee of the fund therefrom derived to this extent, that on his death whatever of the same is remaining shall descend to my grandchildren as herein provided, to wit: Verney Ewart, Alaska Ewart, Lloyd Ewart and Emerson Ewart." Item 7. A devise to Theodore Ewart, similar to the one in item 6.

Under item 6 of the will aforesaid, appellee David Oliver Ewart claims title to the real estate in controversy in fee simple. He moved onto said land in the year 1892, and has since continued to occupy it in person, or by his son Alaska as tenant, and has never sold it. Thalia T. Ewart, widow, died August 26, 1899. "Emerson" Ewart named in item 6 should be Emmet B. Ewart. He was a son of appellee David Oliver Ewart, and died August 12, 1914, testate, leaving his widow, the appellant, but leaving no children. The will of Emmet B. Ewart gives \$500 and one-third of his real estate to his widow, appellant herein. Appellees Alaska Ewart, Lloyd Ewart, and Verney V. Will (formerly Ewart) are the children of appellee David Oliver Ewart, and are the same persons mentioned in item 6 of the will of Mahlon D. Ewart,

and the appellant is the widow and only heir at law of the said Emmet B. Ewart, and is the same person named in his will by that name. Appellees Alaska Ewart, Lloyd Ewart, and Verney V. Will claimed an interest in said real estate through the will of Mahlon D. Ewart, and from no other source, but are not prosecuting an appeal, and appellant claims a fee-simple title to one-twelfth of said real estate through the will of her said husband, Emmet B. Ewart, and through the will of said Mahlon D. Ewart, and from no other source, and further claims that appellee David Oliver Ewart has only a life estate in said real estate. The liens created by items 3, 4, and 5 have been fully paid and discharged.

Upon the foregoing facts the court stated the following conclusion of law: “(1) The law is with the plaintiff, and that he is the owner of said real estate in fee simple, and his title should be quieted in him as against all the other defendants. Dated this 30th day of June, 1916.”

The controlling question in this case is the nature of the estate devised to appellee David Oliver Ewart by the last will and testament of his father,

1. Mahlon D. Ewart, and to determine this it is necessary to construe the will of said Mahlon D. Ewart, especially item 6 thereof. In performing this duty, it should be the primary purpose of the court to determine, if possible, the intention of the testator as expressed in his will, and to give effect thereto. In determining this intention, isolated statements or separate clauses and provisions should not be considered alone, but the whole will should be taken together, and each part be construed with relation to the language used in other

parts, and effect given to the general intention thereby ascertained. 40 Cyc 1414, and cases there cited. *Hayes v. Martz* (1910), 173 Ind. 279, 89 N. E. 303, 90 N. E. 309. Applying this rule of interpretation to

the will in controversy, appellant earnestly insists that it was not the intention of Mahlon D. Ewart, testator, to give to appellee David Oliver Ewart a fee simple in the land involved, as is evidenced by the latter clause of item 6 of such will, by which testator undertakes to give to appellant's husband and other grandchildren of testator, at the death of appellee David Oliver Ewart, the real estate involved, or, in the event that it has been sold by appellee David Oliver Ewart, then the amount remaining of the proceeds of such sale at his death. Appellant's contention is plausible, and it would seem that it should prevail, except for another principle of construction, which must prevail as against appellant's contention. The devise to David Oliver Ewart is "to have and hold forever, *with the power to sell the same and to invest the proceeds thereof in such other property, real or personal, as he may deem best.*" It is a well-established rule that, where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee, and the devise over is repugnant and void. The only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes it to the power of disposal. 40 Cyc 1580; *Curry v. Curry* (1915), 58 Ind. App. 567, 105 N. E. 955; *Cameron v. Parish* (1900), 155 Ind. 329, 57 N. E. 547; *Mulvane v. Rude* (1896), 146 Ind. 476, 481, 45 N. E. 659; *Logan v. Sills* (1902), 28 Ind. App. 170, 62 N. E. 459; *Benninghoff v. Evangelical*

*Assn. Church* (1902), 28 Ind. App. 374, 61 N. E. 952. The authorities to sustain this principle are numerous, but we do not deem it necessary to cite others. Appellant has cited no authorities by which she can escape the rule, and we know of none.

The judgment is affirmed.

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JEFFERSON HOTEL COMPANY v. YOUNG.

[No. 10,364. Filed December 10, 1918. Rehearing denied March 6, 1919. Petition to transfer dismissed May 9, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Notice of Award.*—Under §§59, 60 of the Workmen's Compensation Act (§§8020q2, 8020r2 Burns' Supp. 1918, Acts 1917 p. 154) the Industrial Board is not required to "serve" notice of an award on the parties, and any means ordinarily employed in sending papers, including transmission by mail, express or messenger, is sufficient to meet the requirements of the act. p. 178.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Review of Award.—Time for Filing Application.—Failure to Receive Notice of Award.*—Where the Industrial Board mailed a copy of an award to an employer, but the copy was never received, such failure, in the absence of a showing that it was chargeable to any omission of duty on the part of the board, would not excuse the employer from complying with §60 of the Workmen's Compensation Act (§8020r2 Burns' Supp. 1918, Acts 1917 p. 154), requiring that an application for a review of an award must be made within seven days from the date thereof. p. 178.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Review of Award.—Time for Filing Application.*—Under §§59, 60 of the Workmen's Compensation Act (§§8020q2, 8020r2 Burns' Supp. 1918, Acts 1917 p. 154), a party desiring a review of an award by the full board must make application therefor within seven days from the date of the award, regardless of when he receives a copy of the award which the act provides shall be sent to him. p. 178.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Review of Award.—Waiver of Statute by Applicant.*—Although the Industrial Board retains jurisdiction over the subject-matter of an

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- applicant's claim for certain purposes after an award, it has no jurisdiction to review the same without compliance with §60 of the Workmen's Compensation Act (§8020r2 Burns' Supp. 1918, Acts 1917 p. 154), requiring an application for review of an award to be made within seven days of the date thereof, and an applicant for compensation cannot waive such compliance and confer jurisdiction by consent. p. 180.
- 5. JUDGMENT.—*Relief From.—Statute.—Scope and Applicability.*—Section 405 Burns 1914, §396 R. S. 1881, providing that parties may be relieved from judgments taken against them through mistake, inadvertence, surprise, or excusable neglect, does not apply to special proceedings, unless made applicable thereto by the statute authorizing such proceeding. p. 180.
- 6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Review of Award.*—Even though §405 Burns 1914, §396 R. S. 1881, applied to proceedings under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918), it would not authorize the Industrial Board to extend the time for filing an application for review of an award beyond the period definitely fixed by §60 of the act. p. 181.
- 7. MASTER AND SERVANT.—*Workmen's Compensation Act.—Review of Award.—Diligence.*—Even if the Industrial Board possessed discretionary power to hear and determine an application for review of an award after the expiration of the seven-day period provided in §60 of the Workmen's Compensation Act (§8020r2 Burns' Supp. 1918, Acts 1917 p. 154), the fact that the board's secretary informed the employer that a review could not be had would not justify a delay of three weeks in fixing an application for a review. p. 181.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Harvey Young against the Jefferson Hotel Company. From an order of the Industrial Board dismissing its application for a review of an award for applicant, the defendant appeals. *Affirmed.*

*Pickens, Moores, Davidson & Pickens*, for appellant.

*Seebirt & Schurtz*, for appellee.

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Jefferson Hotel Co. v. Young—170 Ind. App. 172.

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BATMAN, J.—On August 20, 1917, appellee filed his application before the Industrial Board for an adjustment of his claim against appellant for compensation under the Workmen's Compensation Act. A hearing thereon was had on September 13, 1917, at South Bend, Indiana, before a single member of the board, and at which appellant appeared by attorneys. Thereafter on February 27, 1918, said member of the board rendered an award in favor of appellee. On April 3, 1918, appellant filed its application for a review of said award before the full board, alleging that it was not sustained by the evidence, and was contrary to law, and that neither it nor its insurer had received a copy thereof as required by law. On April 27 and June 21, 1918, additional evidence was heard on said application, and thereafter on June 28, 1918, the full board made a finding of facts, and entered an order dismissing said application. The finding of facts is long, but the portions thereof material to a determination of the questions presented on appeal are substantially as follows: That on February 27, 1918, the date of said award, the Industrial Board, by its secretary, transmitted, by United States mail, to Wilkerson, Cassels and Potter of Chicago, Illinois, the attorneys for the Ocean Accident and Guarantee Corporation, Limited, a copy of said award, which was not received by said attorneys; that, at the time of appellee's alleged injury, said corporation was the compensation insurance carrier of appellant; that no copy of said award was transmitted by said board to appellant; that said corporation, as the compensation insurance carrier of appellant, on April 3, 1918, filed in the name of appellant an application for a review before the full board; that in the matter of appellee's claim the



said corporation, as the compensation insurance carrier, assumed to act for and instead of appellant; that some time prior to March 27, 1918, appellee, by and through his attorneys, notified appellant of the award rendered on February 27, 1918, and demanded payment thereof; that prior to September 13, 1917, on said date, and ever since, said corporation has maintained an office in the city of Chicago, Illinois, from and through which it handles its compensation claims at South Bend, Indiana, the place where said claim was heard before a single member of the board, prior to making the award; that on March 7, 1918, the said corporation received at its office in Chicago, Illinois, a letter from appellee's attorneys apprising it of the award made on February 27, 1918; that on said date said corporation, through its employes in said office, by and through said letter, became apprised of the fact that said award had been made on February 27, 1918; that said letter was submitted, and the contents thereof made known, to the manager of said corporation in charge of said office on March 11, 1918; that on said date said manager wrote to the office of said corporation at the city of Indianapolis, Indiana, directing said office to make inquiry at the office of said board, as to whether or not said award had been made; that said letter was received by the office of said corporation in Indianapolis, Indiana, on March 12, 1918; that on said date an employe of said corporation in said city made inquiry of the secretary of said board as to whether or not said award had been made, and was informed by him that said award had been made on February 27, 1918; that said information was on said date transmitted by letter to the manager of the Chicago office of said

corporation, and was by said manager received on March 13, 1918; that on March 29, 1918, said board received a letter from appellee's attorneys, in which they stated that they would waive objection that an application for a review before the full board was not filed within seven days; that the contents of said letter were communicated to said corporation by a letter from said board on March 30, 1918, which was received by said corporation at Chicago, Illinois, on April 2, 1918. Based on said finding, the board entered an order dismissing appellant's application for a review of the award. From this order appellant has appealed, and submits the action of the board in dismissing its application for review as the sole error on which it relies for reversal.

The Workmen's Compensation Act makes the following provision pertinent to a determination of the question presented by this appeal:

Sec. 59. "The board, by any or all of its members, shall hear the parties at issue, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of proceedings, and a copy thereof shall immediately be sent to each of the parties in dispute." Acts 1917 p. 154, §8020q2 Burns' Supp. 1918.

Sec. 60. "If an application for review is made to the board within seven days from the date of an award, made by less than all the members, the full board, if the first hearing was not held before the full board, shall review the evidence, or, if deemed advisable, hear the parties at issue, their representatives and witnesses as soon as practicable and shall make an award and file same, with a finding of the facts on which it is based, and the rulings of law by

the full board, if any, and send a copy thereof to each of the parties in dispute, in like manner as specified in the foregoing section." Acts 1917 p. 154, *supra*.

It will be observed that appellant did not file its application for a review of the award within the seven-day period provided in said §60. Appellee contends that the right to review an award is statutory, and can only be had by a strict compliance with the statute providing for the same, as without such compliance the board has no jurisdiction over the subject-matter. As opposed to this contention appellant asserts that the board has discretionary power, when a proper showing is made, to ignore the seven-day period provided in said §60; that the facts of this case called for the exercise of such discretion in its favor, and the failure of the board to do so was error. In support of this contention it cites the opinion of this court in the matter of *In re Ale* (1917), 66 Ind. App. 144, 117 N. E. 938. That opinion, however, does not sustain appellant's contention, as it only goes to the extent of holding that the right of a party to have an award reviewed should not be prejudiced by the failure of the board to discharge a statutory duty. In reaching this conclusion, the court followed the general rule that, where a party, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right wholly by the neglect or misconduct of an officer charged with a public duty with reference thereto, the law will protect him. It also recognized the principle involved in the maxim of the law that "an act of the court shall prejudice no one," and applied it to the Industrial Board, which, although an administrative body, has at least quasi-judicial powers. The effect of the ruling in the

opinion cited is not to break down the provision of the statute limiting the time in which an appeal may be taken, but to exclude from its operation such time as may have been lost solely by the failure of the board to discharge a required duty. In this case the finding of facts shows that, on the date the award was made, a copy of the same was transmitted by the secretary of the board to Wilkerson, Cassels and Potter of Chicago, Illinois, the attorneys for appellant's compensation insurance carrier, who were evidently the same attorneys that appeared for appellant at the hearing before the single member of the board at South Bend, as disclosed by the record. The statute does

1. not require that such copy shall be *served* on the parties, nor does it specify the manner in which it shall be transmitted to them. It merely provides in said §59 that "a copy thereof shall immediately be *sent* to each of the parties in dispute." In the absence of any provision in that regard, we may assume that the legislature intended that the board might discharge such duty by the use of any means ordinarily employed in sending papers, which would include transmission by mail, express, or messenger. In the instant case the United States mail was used for such purpose, but the copy so sent was not received. This failure, however, is not shown to be chargeable to any omission of duty on the part of the board, and hence does not fall within the ruling made in the matter of *In re Ale, supra*.
- 2.

But the appellant contends that said §59 and §60 should be so construed as to require a party who has

3. actually received a copy of the award, transmitted as provided in the former section, to file his application for a review thereof within the

seven-day period provided in the latter section; but as to a party who has not received a copy of the award, and has no knowledge that one has been made, it is only necessary that he use diligence to secure a review of the same after he obtains knowledge thereof. We cannot concur in this contention. To do so would require that we hold that the seven-day period in which a party may file an application for a review shall run from the time of receiving notice that an award had been made, rather than from the date of the award as the statute expressly provides. A party to a proceeding before the board is entitled to know with reasonable certainty when a hearing on an application becomes final and an award thereon becomes effective. This could not be under appellant's contention, as long as the statute only requires the board to send a copy of the award to the parties in dispute. If the construction of the statute for which appellant contends was adopted, a party would always stand in danger of having the status of a claim unsettled, after the lapse of the statutory seven-day period for review, by the opposing party appearing before the board and asserting that it did not receive a copy of the award which the board was required to send, and did not know that one had been made, and claiming the right to have the award reviewed. It would open the way for fraud and dishonest practice against which diligence would not afford protection. If it had been the intention of the legislature that the seven-day period for filing an application for review should begin to run against a party from the time of notice that an award had been made, rather than from the date thereof as the statute expressly provides, it is reasonable to presume that some appropriate lan-

guage would have been used indicating such fact, and that some method would have been provided by which the beginning of said seven-day period could be definitely ascertained. In the absence of such language and such a provision, we are constrained to hold that the legislature did not so intend. The reasons on which appellant bases his contention would be appropriate and possibly effective in support of a proposed amendment of the statute in that regard, but do not furnish grounds for reaching the same result through judicial construction.

Appellant further contends that the consent of appellee to a review of the award, after the lapse of the seven-day period, gave the board jurisdiction

4. to hear and determine appellant's application therefor. While the Industrial Board retained jurisdiction over the subject-matter of appellee's claim for certain purposes after the award, it had no jurisdiction to review the same without a compliance with said §60. Appellee could not waive such compliance and confer jurisdiction by consent. *Steinmetz v. G. H. Hammond Co.* (1906), 167 Ind. 153, 78 N. E. 628.

Appellant also contends that §405 Burns 1914, §396 R. S. 1881, authorizes the board to grant a review of the award under the facts of this case. That

5. section relates to civil procedure in courts of this state, and it appears not to be applicable to special proceedings, unless made so by the statute authorizing the same. *Hays v. Tippy* (1883), 91 Ind. 102; *Dukes v. Working* (1884), 93 Ind. 501; *Shaum v. Harrington* (1910), 173 Ind. 610, 91 N. E. 226; *Amacher v. Johnson* (1910), 174 Ind. 249, 91 N. E. 928. It has been held that the rules of procedure prescribed

in the Civil Code are not available in matters before the Industrial Board. *Carl Hagenbeck, etc., Shows Co. v. Leppert* (1917), 66 Ind. App. 261, 117

6. N. E. 531; *Union Sanitary Mfg. Co. v. Davis* (1917), 63 Ind. App. 548, 114 N. E. 872. In any event the application of said statute could not have the effect of authorizing the board to extend the time for filing an application for review beyond the period definitely fixed by the act providing for the same.

We may add, however, that, if appellant was correct in its contention that the Industrial Board possessed discretionary power to hear and determine an

7. application for review after the expiration of the seven-day period provided in said §60, it would not be entitled to prevail on this appeal, either on the evidence adduced at the hearing, or the facts found by the board. There are no facts found that show proper diligence to secure a review of the award after notice thereof, and no evidence which would justify such a finding. Appellant gives some stress to the fact that the evidence shows that the secretary of the board informed the stenographer of the claim agent of appellant's compensation insurance carrier, when she called on him with reference to a review of the award, that it could not be had as the time had expired. But this fact would not justify a further delay of three times the statutory period of seven days provided in said §60, if it desired to offer and press an excuse for a prior delay in filing its application for review.

The record fails to disclose any available error, and the order of the Industrial Board, dismissing appellant's application for review, is therefore affirmed.

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Brown v. Farmers' State Bank—70 Ind. App. 182.

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BROWN v. FARMERS' STATE BANK ET AL.

[No. 10,342. Filed May 13, 1919.]

1. INSURANCE.—*Life Insurance.—Rights of Beneficiary.*—The beneficiary in an ordinary life insurance policy has a vested interest therein, which cannot be changed without his consent. p. 186.
2. INSURANCE.—*Life Insurance.—Policies Payable to Estate.—Assignment by Insured.*—Where a life policy is payable to insured's estate, he can make an assignment thereof either orally or in writing. p. 186.
3. FRAUDULENT CONVEYANCES.—*Life Policy.—Oral Assignment.—Validity.—Defrauding Assignor's Creditors.*—Where insured and his father, the beneficiary in a life policy, talked about changing the policy so as to make the son's wife the beneficiary, but, on the advice of the cashier of a bank holding the policy as collateral security for the payment of a note that it would be better not to make any changes until after the note was paid, nothing was done relative to changing the beneficiary, on the death of the son the proceeds of the policy were the absolute property of the father, although he had informed insured that in case of the latter's death he would assign the insurance to the wife, and the father could not, after insured's death, make a gift of such proceeds to the wife to the detriment of the father's creditors. p. 187.

From Wells Circuit Court; *William H. Eichhorn*, Judge.

Proceeding supplementary to execution by the Farmers' State Bank against Thomas M. Brown, Edith Brown and others. From the judgment rendered, Edith Brown appeals. *Affirmed.*

*Jacob F. Denney*, for appellant.

*Mock & Mock* and *A. W. Hamilton*, for appellees.

McMAHAN, J.—The appellee Farmers' State Bank of Ossian, Indiana, filed its verified complaint supplemental to execution against appellee Thomas



M. Brown. It was alleged in the complaint that the appellant and appellee People's State Bank had property and money in their possession belonging to Thomas M. Brown, and asked that they be required to answer concerning the same. The appellees Beatty and Doan Company and Fred N. Sharpe were also named in said complaint as having judgments against Thomas M. Brown, and they were required to appear and answer as to their interests in said money and property. The appellees Beatty and Doan Company and Fred N. Sharpe appeared and filed separate verified cross-complaints supplemental to execution against Thomas M. Brown, and also asking that appellant and the People's State Bank be required to answer as to certain money alleged to be in their hands which belonged to Thomas M. Brown.

The cause was tried by the court which found that the appellee Thomas M. Brown was indebted to the Farmers' State Bank in the sum of \$241.32, to Fred Sharpe in the sum of \$385.55, and to Beatty and Doan Company in the sum of \$412 on the several judgments mentioned in the complaints; that the appellant had prior to the filing of the several complaints received and then had in her possession and under her control \$1,546.15 in cash belonging to said Thomas M. Brown; that \$796.17 of said money had been deposited by appellant and was then on deposit in the said People's State Bank, and that an amount sufficient to pay and satisfy said judgments should be paid into court for that purpose. Judgment was rendered in accordance with the findings.

The appellant filed a motion for a new trial on the grounds that the decision of the court was not sustained by sufficient evidence and was contrary to law.

guage would have been used indicating such fact, and that some method would have been provided by which the beginning of said seven-day period could be definitely ascertained. In the absence of such language and such a provision, we are constrained to hold that the legislature did not so intend. The reasons on which appellant bases his contention would be appropriate and possibly effective in support of a proposed amendment of the statute in that regard, but do not furnish grounds for reaching the same result through judicial construction.

Appellant further contends that the consent of appellee to a review of the award, after the lapse of the seven-day period, gave the board jurisdiction

4. to hear and determine appellant's application therefor. While the Industrial Board retained jurisdiction over the subject-matter of appellee's claim for certain purposes after the award, it had no jurisdiction to review the same without a compliance with said §60. Appellee could not waive such compliance and confer jurisdiction by consent. *Steinmetz v. G. H. Hammond Co.* (1906), 167 Ind. 153, 78 N. E. 628.

Appellant also contends that §405 Burns 1914, §396 R. S. 1881, authorizes the board to grant a review of the award under the facts of this case. That

5. section relates to civil procedure in courts of this state, and it appears not to be applicable to special proceedings, unless made so by the statute authorizing the same. *Hays v. Tippy* (1883), 91 Ind. 102; *Dukes v. Working* (1884), 93 Ind. 501; *Shaum v. Harrington* (1910), 173 Ind. 610, 91 N. E. 226; *Amacher v. Johnson* (1910), 174 Ind. 249, 91 N. E. 928. It has been held that the rules of procedure prescribed

in the Civil Code are not available in matters before the Industrial Board. *Carl Hagenbeck, etc., Shows Co. v. Leppert* (1917), 66 Ind. App. 261, 117

6. N. E. 531; *Union Sanitary Mfg. Co. v. Davis* (1917), 63 Ind. App. 548, 114 N. E. 872. In any event the application of said statute could not have the effect of authorizing the board to extend the time for filing an application for review beyond the period definitely fixed by the act providing for the same.

We may add, however, that, if appellant was correct in its contention that the Industrial Board possessed discretionary power to hear and determine an

7. application for review after the expiration of the seven-day period provided in said §60, it would not be entitled to prevail on this appeal, either on the evidence adduced at the hearing, or the facts found by the board. There are no facts found that show proper diligence to secure a review of the award after notice thereof, and no evidence which would justify such a finding. Appellant gives some stress to the fact that the evidence shows that the secretary of the board informed the stenographer of the claim agent of appellant's compensation insurance carrier, when she called on him with reference to a review of the award, that it could not be had as the time had expired. But this fact would not justify a further delay of three times the statutory period of seven days provided in said §60, if it desired to offer and press an excuse for a prior delay in filing its application for review.

The record fails to disclose any available error, and the order of the Industrial Board, dismissing appellant's application for review, is therefore affirmed.

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now in suit were executed by Mr. Miller for the purpose of avoiding any embarrassment to the bank which might result from a continued holding of its own stock, and that, in fact, he acquired neither the title to nor the possession of that stock in his individual capacity. Some contention is also made that, as the purchase by the bank of its own stock was in violation of law, the subsequent action of Mr. Miller in taking that stock as trustee and in executing his note therefor was also based on an illegal consideration, which would serve now to avoid the instrument in suit. The soundness of this latter contention is seriously, and, we think, correctly challenged by counsel for appellant. *Lantry v. Wallace* (1901), 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218; *Thompson v. St. Nicholas Nat. Bank* (1892), 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956.

However, as we view the questions presented by the instant case, there is no occasion to enter on a discussion of the legal proposition considered and determined in the cases just cited, since its application here must rest on the assumption that Hiram W. Miller actually purchased in his own right the stock previously purchased by the bank and later held by him as trustee for the bank. That assumption involves an issue of fact which has been decided by the trial court adversely to appellant's contention. The true inquiry in this case, as before indicated, is to determine the admissibility of the evidence challenged by appellant, and, in passing on this question, it is unnecessary to treat separately each of the rulings involved. Indeed, appellant has contented itself with a statement and discussion of certain general propositions as applicable and pertinent to each of said rulings.



It appears that former officers of the bank and others who were familiar with the transaction were permitted to testify to certain facts which tended to show that Mr. Miller never owned the stock in question. Appellant contends, in effect, that this evidence serves only to prove an alleged agreement between Mr. Miller and the bank that he would not be required to pay the note in suit, and that its admission for that purpose was erroneous. *Bank of United States v. Dunn* (1832), 31 U. S. (6 Pet.) 51, 8 L. Ed. 316; *Bank v. Moore* (1905), 138 N. C. 529, 51 S. E. 79; *McDonald v. Elfes* (1878), 61 Ind. 279.

Assuming, for the purposes of argument, that the questioned testimony, or any part of it, is open to the interpretation given thereto by appellant, it is

2. equally certain that it tends to establish appellees' contention that the note in suit was executed by Miller for the use of the bank and without benefit to himself. The trial court seems to have received the evidence on that theory, and its action is sustained by the authorities. It has frequently been held that, as between the original parties, parol evidence is admissible to show the circumstances under which a bill or note was given, and, in case no consideration passed to the maker, that fact may be so established. *Smythe v. Scott* (1886), 106 Ind. 245, 248, 6 N. E. 145; *Tombler v. Reitz* (1893), 134 Ind. 9, 14, 33 N. E. 789; *First Nat. Bank, etc. v. Nugen* (1884), 99 Ind. 160, 164; *Smith v. Boruff* (1881), 75 Ind. 412, 414; *Chicago, etc., R. Co. v. West* (1871), 37 Ind. 211, 216; *Neptune v. Paxton* (1895), 15 Ind. App. 284, 288, 43 N. E. 276; 1 Daniel, Negotiable Instruments (6th ed.) §81a.

If a suit had been brought by appellant during the

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lifetime of Hiram W. Miller to enforce payment of the note which he had signed there can be no doubt, under the above authorities, that he would have been entitled to show that the instrument was executed solely for the benefit of the bank, and that no consideration actually passed to him. No rights of third parties have since intervened, and the same defense was therefore properly presented by his heirs and representatives. The evidence introduced at the trial is in sharp conflict in some particulars, and various inferences might be drawn therefrom, but it is evident that, to the mind of the trial court, the defense above stated has been satisfactorily established, and its finding thereon is conclusive.

Judgment affirmed.

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INDIANAPOLIS AND CINCINNATI TRACTION COMPANY v.  
HARDWICK, ADMINISTRATRIX.

[No. 9,841. Filed May 14, 1919.]

1. *APPEAL.—Questions Presented.—Ruling on Demurrer.—Waiver.—Failure to Except.*—Where defendant failed to except to the ruling of the trial court in overruling its demurrer to the complaint, it waived the question, and such ruling will not be reviewed on appeal. p. 196.
2. *APPEAL.—Review.—Verdict.—Interrogatories.—Scope of Review.*—In passing on a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, the court looks only to the general verdict, the issues, and the answers to the interrogatories. p. 198.
3. *TRIAL.—Verdict.—Scope and Effect.*—A general verdict for plaintiff finds every material allegation of the complaint against the defendant. p. 198.
4. *APPEAL.—Review.—Answers to Interrogatories.—Presumptions Favoring General Verdict.*—In passing on a motion for judgment on the answers to interrogatories all presumptions are in favor

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of the general verdict, if the pleadings will admit evidence to overcome the answers. p. 198.

5. *CARRIERS.—Injuries to Prospective Passenger.—Action.—Questions for Jury.—Contributory Negligence.*—In an action against an interurban railway for the death of a prospective passenger waiting to board a car at a signal stop, where the complaint alleged that it was the custom, acquiesced in and acknowledged by defendant, for persons intending to board a car after dark to enter upon the track and swing a light as a signal for the car to stop, and that decedent, believing an approaching car was a regular passenger car which would stop on signal, went upon the track to give the customary signal, and was run down and killed by cinder trucks attached to the front end of such car and upon which trucks defendant had carelessly and negligently failed to place any lights, so that on account of the darkness they could not be seen by decedent, it was for the jury to determine whether decedent was guilty of contributory negligence. p. 198.

6. *APPEAL.—Presenting Questions for Review.—Briefs.—Failure to Show Filing of Instructions.*—Where it does not appear from appellant's brief that the instructions were filed with the clerk, they are not in the record, and the omission cannot be supplied in the reply brief. p. 199.

7. *APPEAL.—Questions Presented.—Correctness of Instructions.*—Where the exception taken to the instructions was joint, and it is admitted on appeal that some of those given were correct, no question is presented for review as to the instructions. p. 190.

From Wayne Circuit Court; *Nathan A. Whitaker*, Judge.

Action by Cora B. Hardwick, administratrix of the estate of John Hardwick, deceased, against the Indianapolis and Cincinnati Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Kittenger & Diven, Morgan & Morgan and Kivett & Kivett*, for appellant.

*C. E. Fenstermacher, L. W. Curry and H. L. McGinnis*, for appellee.

NICHOLS, J.—This was an action brought by the appellee against the appellant to recover damages for

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the death of her husband, John Hardwick, who was killed by being struck by one of appellant's work trains. The complaint was in one paragraph, to which a demurrer was filed by appellant and overruled by the court. Appellant filed a general denial to the complaint, and the cause was submitted to the jury for trial. There was a general verdict for \$2,500, with answers to interrogatories. The appellant made its motion for judgment in its favor on the interrogatories and answers thereto, which was overruled, to which ruling the appellant excepted. Judgment was entered on the general verdict in favor of the appellee in the sum of \$2,500 and costs. From this judgment this appeal is prosecuted.

Errors relied upon for reversal are: (1) The court erred in overruling appellant's demurrer to the complaint. (2) The court erred in overruling appellant's motion for judgment in its favor upon the interrogatories answered by the jury notwithstanding the general verdict. (3) The court erred in overruling appellant's motion for a new trial.

The substance of the complaint, so far as is necessary for this decision, is as follows: The appellee is the administratrix of the estate of John Hardwick, deceased. The appellant at the time of the accident resulting in the death of appellee's decedent operated a street railway from the city of Indianapolis to the city of Connersville, Indiana, as a common carrier of passengers for hire. Stop 33 was one of its stopping places, at which it stopped upon signal given to the motorman in charge of the car. In order to give such a signal after dark, it was customary for intended passengers to enter upon the track at said stopping place and swing a light across the track in

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front of the approaching car; such custom was well known to the defendant company. On November 27, 1911, it was, and had been for a long time prior thereto, the custom, and the schedule time, of the defendant company to run one of its passenger cars in a westerly direction passing stop 33 at about 6:00 p. m., which car, upon signal given, would stop to take passengers, all of which was well known both to the deceased and the appellant. About 6:00 p. m. of said day, being after dark, the deceased went to said stop 33 for the purpose of taking passage on appellant's car due to pass about that time, and, while deceased was waiting for such car to arrive, the appellant carelessly and negligently approached said stop from the east, with a work car, which looked like, and had the appearance of, a passenger car which was then about due at said stop, which car was equipped and lighted with electric lights in the same manner as such passenger cars, and carelessly and negligently had attached to the front end of said car four cinder trucks, which trucks were about five feet lower than the said work car, and extended about 200 feet in front of said work car. Appellant carelessly and negligently placed lights in said work car, and carelessly and negligently failed to place any light or lights or signal of warning on said cinder trucks, and carelessly and negligently failed to give warning to the deceased of the position of said cinder trucks. On account of the darkness, and of the negligence of the defendant as aforesaid, said cinder trucks could not be seen by a person standing near said track at said stop in time to avoid being struck by them. On said November 27, 1911, as the defendant approached said stop with said work car, and said cinder trucks in front of said work car, de-

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ceased, believing it was one of its passenger cars that was about to pass said stop aforesaid, went upon the track with a lighted lantern in his hand to signal such car to stop for the purpose of taking passage on the same, and while he was in the act of signaling said car to stop he did not know of said cinder trucks, and could not see them in time to avoid being struck by them. The defendant carelessly and negligently approached, and carelessly and negligently ran its cinder trucks against and over the deceased and thereby killed him. The complaint further avers that the deceased left surviving him the appellee as his widow and seven minor children all dependent upon him for support and maintenance. There is a prayer for damages in the sum of \$10,000.

The appellant failed to except to the ruling of the court in overruling its demurrer to the complaint, and

has thereby waived the question, and such rul-

1. ing will not be reviewed. *Young v. McLane* (1856), 8 Ind. 357. We do not need to cite other authorities; this rule is elementary.

So far as is material to this decision, the jury found in substance: That the decedent and his daughter had gone to stop 33 after dark, for the purpose of taking passage on one of appellant's cars to Rushville. The decedent lived about one-half mile from said stop for eight months before the accident. He was fifty-seven or fifty-eight years of age, his hearing and eyesight were good, and he could read. He had frequently boarded and alighted from cars at this stop, and was acquainted with the surroundings and location, and knew that work trains, freight trains and passenger cars passed said stop both in the daytime and nighttime; that the train that killed decedent consisted of

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a motor car and four cinder trucks pushed in front of it, and extending in front about 135 feet, and over the rails of the track at the side about twenty-four inches; that there was a platform on the front of the cinder trucks about four feet wide and four feet and four inches above the rails of the track, the bed of the cinder trucks being about four feet above this platform, making the trucks eight feet and four inches high; that the track was straight for about a mile and the ground level for a distance of about a mile east. There was no obstruction along the track east except a pole line on the north side of the track three feet and eleven inches north of the north rail of the track. There was a shelter house on the north side of the tracks about four feet therefrom, and a cinder platform between the shelter house and the north rail of the track. The decedent was killed about 5:40 p. m., and the next passenger car was due to arrive at 5:58 p. m., which was after dark. There was no lantern carried on the front end of the cinder trucks which struck decedent. There was nothing to prevent decedent from seeing a light on the front end of the train as it approached stop 33, if a light had been there. The decedent was in the shelter house on the north side of the track, and left it to go partially between the rails of the track, for the purpose of signaling a car which he knew was approaching, and tried to signal it by waving the lighted lantern across the tracks. He could have seen the car from the north side of the tracks, but voluntarily straddled the rail to signal it. If he had stood north of the tracks more than two feet from the north rail he would not have been injured. The train of cars made a noise as they approached. At about the time the decedent went

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upon the track his daughter said to him, "Watch out papa." The approaching train whistled at about 1,400 feet from the stop, and the decedent heard it, and upon hearing it went out of the shelter house, and, after looking, called for the lantern, which was handed to him by his daughter, and then went partially into the middle of the track. After the whistle, the train continued to approach stop 33.

In passing upon the motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, the court looks only to the

2-4. general verdict, the issues, and the answers to interrogatories. The general verdict finds every material allegation of the complaint against the losing party. *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 654, 104 N. E. 866, 106 N. E. 739; *Stoy v. Louisville, etc., R. Co.* (1903), 160 Ind. 144, 66 N. E. 615. All presumptions are in favor of the general verdict, if the pleadings will admit evidence to overcome the answers. *Williams v. Lowe* (1916), 62 Ind. App. 357, 113 N. E. 471.

In this case the jury has found by its general

5. verdict that the appellant was guilty of negligence that resulted in the death of appellee's decedent, and that the decedent was not guilty of contributory negligence. It is averred in the complaint that stop 33 was a stop where the appellant's cars stopped on signal; that it was the custom for passengers intending to board a car to enter upon the track at such place and swing a light across the track, which custom was well known to the appellant, and acquiesced in and recognized by it, by stopping its cars upon such signals; that near the time decedent's car should arrive a car came from the east with four



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cinder trucks in front of it; that the car was equipped with electric lights, but the cinder trucks were not lighted at all; that no warning was given of the position or location of such cinder trucks, which were lower than the car, and decedent could not see them because of the darkness, and decedent believed the car to be the regular passenger car which would stop on signal; that so believing, he went upon the track to signal with a light as was the custom at said stop, and was killed by the cinder trucks. Evidence was admissible to prove these averments, and the answers to interrogatories are not inconsistent with them. Under such averments it was for the jury to say whether decedent was guilty of contributory negligence. *Chicago, etc., R. Co. v. Sharp* (1894), 63 Fed. 532, 11 C. C. A. 337; *Deister v. Atchison, etc., R. Co.* (1917), 99 Kan. 525, 162 Pac. 282, L. R. A. 1917C 784. The motion for judgment on the answers to interrogatories in favor of appellant was properly overruled.

It does not appear by the appellant's brief that the instructions were filed with the clerk, hence they are not in the record. *Suloj v. Retlaw Mines Co.*

6. (1914), 57 Ind. App. 302, 107 N. E. 18; *Hotmire v. O'Brien* (1909), 44 Ind. App. 694, 90 N. E. 33. This omission cannot be supplied in the reply brief. *Decker v. Mahoney* (1917), 64 Ind. App. 500, 116 N. E. 57; *Fox v. State* (1917), 186 Ind. 299, 116 N. E. 295.

There is no question presented as to the instructions, as it is admitted that some of the instructions given were correct, and the exceptions taken

7. were joint. *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 80 N. E. 538; *Kelly v. John* (1895), 13 Ind. App. 579, 41 N. E. 1069.

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The evidence substantially sustains the averments of the complaint, and this is sufficient to support the verdict of the jury.

We find no reversible error. The judgment is affirmed.

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SEITZ v. KOTHE-WELLS AND BAUER.

[No. 9,830. Filed May 14, 1919.]

**APPEAL.—Matters Reviewable.—Ruling on Demurrer.—Judgment Harmless to Defendant.**—In an action to foreclose a chattel mortgage in which appellant was made a party defendant to answer as to his interest in the property involved under a prior mortgage, where there was a general finding for plaintiff and against defendant, and on appeal defendant did not challenge the finding that he had no interest in the mortgaged chattels, but complained only of the ruling of the trial court in sustaining a demurrer to an answer alleging that plaintiff's mortgage was void, the judgment must be affirmed, since appellant, having failed to show or claim any interest in the property in question, could not have been harmed by the judgment and decree, and the court on appeal in such a case will not determine the mere abstract question as to the correctness of the ruling on the demurrer.

From Marion Superior Court (99,029); *W. W. Thornton*, Judge.

Action by Kothe-Wells and Bauer against Charles Seitz and another. From the judgment rendered, the defendant named appeals. *Affirmed*.

*White & Jones*, for appellant.

*Pickens, Cox & Conder*, for appellee.

ENLOE, J.—This action was begun by the Kothe-Wells and Bauer Company, appellee, to foreclose a chattel mortgage executed by one Daniel E. Rogers,

on January 6, 1915, to secure the payment to appellee, when it should become due, of a certain promissory note of even date, for the sum of \$206.68 due in thirty days, and upon payment of which a default had been made.

In June, 1914, appellant had loaned to said Rogers the sum of \$500 and had also indorsed a certain promissory note in the amount of \$700 for said Rogers, and to secure the appellant in the matter said Rogers had executed to appellant a chattel mortgage upon the same property afterwards covered by the mortgage in suit.

The appellant was made a defendant in this suit to answer to his interest in and to the property in question, and he filed an answer in three paragraphs: First, general denial; second, alleging that the mortgage to appellee was void under the provisions of the Bulk Sales Law of this state (Acts 1909 p. 122, §7471a Burns 1914), and, third, setting up a claim under the mortgage of June, 1914, and asked that his mortgage be decreed a prior lien to that of appellee.

To the above-mentioned second and third paragraphs of answer demurrers were filed, and sustained as to second and overruled as to the third paragraph, and reply in general denial by appellee closed the issues.

A trial was had before the court, which made a general finding in favor of appellee, and against appellant, and that appellant had no interest in or lien upon the property in question, and judgment was rendered accordingly, and property ordered sold to pay appellee's debt.

The appellant then filed his motion for a new trial, assigning various reasons therefor, but, as the action

of the trial court in overruling same is not challenged on this appeal, the same need not be set out.

The only error complained of in this case is the action of the trial court in sustaining the demurrer to the appellant's second paragraph of answer, and in thereby refusing to hold said mortgage to appellee void.

If the appellant had any lien upon, or interest in, the property covered by the mortgage to the appellee, so that he was injured, as to his property, by said decision, he might be in a situation to complain; but here he is not complaining of the action of the court in finding and decreeing such want of interest. He is in the attitude of confessing that the decree is right, and that he has no interest in the property, yet is seeking to question the correctness of the ruling of the court upon the demurrer. If he had no interest in the property, he was not harmed, and he has no legal right to complain.

In 2 R. C. L., page 52, it is said: "In addition to the requirement of a substantial interest in the subject-matter of the litigation, it is essential, in order that a person may appeal or sue out a writ of error, that he shall be aggrieved or prejudiced by the judgment or decree; appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant"—citing authorities. *McFarland v. Pierce* (1897), 151 Ind. 546, 45 N. E. 706, 47 N. E. 1; *Gavin v. Board, etc.* (1882), 81 Ind. 480.

We have, however, considered said second paragraph of answer. There was no error in sustaining the demurrer thereto.

Judgment is affirmed.

## DELASKI v. KOVACICH ET AL.

[No. 9,854. Filed May 14, 1919.]

1. **APPEAL.**—*Review.*—*Verdict.*—*Conclusiveness.*—A finding of the jury based on conflicting evidence is conclusive on appeal. p. 203.
2. **HUSBAND AND WIFE.**—*Action for Service by Wife.*—*Joining Husband as Party.*—Section 255 Burns 1914, §254 R. S. 1881, providing that a married woman may sue alone when the action covers her personal property, is permissive, and does not prohibit the husband joining with her in the prosecution of an action to recover compensation for her services rendered on her sole and separate account. p. 204.

From Lake Circuit Court; *Virgil S. Reiter*, Judge.

Action by Peter Kovacich and another against Louis Delaski. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

*McMahan & Conroy*, for appellants.

*Merritt D. Metz*, for appellees.

MCMAHAN, J.—Action by appellees, Peter Kovacich and his wife, Helen Kovacich, against the appellant for compensation for the care and support of Louise Delaski, an eight year old child of the appellant.

The appellees in their complaint allege that appellant expressly agreed to pay them for the care and support of said child, and that he has failed and refused to do so. The issues were closed by a general denial. Trial by jury, verdict and judgment for appellees. Appellant filed a motion for a new trial, which was overruled.

The appellant contends that the verdict is contrary to law. There was a sharp conflict in the evidence as to whether there was an agreement on the part

1. of appellant to pay for the care of said child,

but that was a question for the jury, and they, by their verdict, found that there was, and that finding is binding on us.

The evidence shows that the appellant is the step-father of the appellee Helen. Appellant's wife, who was the mother of Helen and Louise, died in July, 1911, leaving four children, the fruit of her marriage to appellant, to wit: Louise, aged about four, another girl, aged about twelve, and two boys, aged six and fifteen. The appellees were married and living in Hegewish, Illinois.

On the day appellant's wife was buried, appellant had a talk with appellee Helen in the presence of her husband about the care of the children, in which appellant told Helen to take Louise, and he would pay her, to which Helen agreed. Appellant and appellee Peter had no talk or conversation relating to the care or pay for keeping the child. The conversation was between appellee Helen and the appellant in the presence of appellee Peter. Following this conversation the appellees took the child home with them, and boarded and clothed her for a period of nearly five years, and have received no compensation for such service.

The appellant insists that the agreement proved was an agreement between appellant and appellee Helen, and that there is therefore a variance between the pleadings and the proof; that proof of an agreement to pay one of the appellees will not support a verdict in favor of both of them.

Section 255 Burns 1914, §254 R. S. 1881, provides that a married woman *may* sue alone when the action concerns her personal property. Section

2. 7867 Burns 1914, §5130 R. S. 1881, provides that a married woman may carry on any trade

or business and perform any labor or service on her sole and separate account, and the earnings and profits of any married woman accruing from her trade, business, service, or labor other than for her husband or family shall be her sole and separate property.

If the services and labor which appellee Helen performed for the appellant were rendered on her sole and separate account, the earnings became her sole and separate property, and she might have maintained an action in her own name therefor under said §255.

The language of the statute is permissive, and does not prohibit the husband joining with her in the prosecution of an action to recover compensation for her services. As said by the Supreme Court in *Martindale v. Tibbetts* (1861), 16 Ind. 200: "This statute we regard as rendering it optional to bring the suit in the name of the wife alone, or that of the husband and wife, when the action concerns her separate property." See, also, *Ohio, etc., R. Co. v. Cosby* (1886), 107 Ind. 32, 7 N. E. 373; *Roller v. Blair* (1884), 96 Ind. 203; *City of New Albany v. Lines* (1899), 21 Ind. App. 380, 51 N. E. 346.

There was no error in overruling the motion for a new trial. Judgment affirmed.

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FEICHTER v. KORN ET AL.

[No. 10,372. Filed May 15, 1919.]

1. **FRAUDS, STATUTE OF.**—*Contract for Sale of Land.*—*Sufficiency of Memoranda.*—Under the statute of frauds, which requires that all contracts for the sale of real estate shall be in writing, separate writings cannot be construed together as constituting a con-

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tract, where there is no reference in any one of the instruments to either of the others, and extrinsic evidence, which is not permissible, would be necessary to show their relation. p. 210.

2. **PLEADING.—Exhibits.—Variance.**—Where there is a variance between a pleading and exhibits filed therewith, the latter control. p. 210.

3. **VENDOR AND PURCHASER.—Offer and Acceptance.**—A memorandum covering a sale of land providing that, "if this deal is made, it must be not later than October 1, 1916," constituted merely an offer to sell, and not a final agreement the specific performance of which could be enforced, without showing an acceptance of the offer within the time given. p. 210.

From Allen Circuit Court; *J. W. Eggeman*, Judge.

Action by Jacob H. Feichter against John Korn and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*John H. Aiken*, for appellant.

*Breen & Morris*, for appellees.

**NICHOLS, J.**—Appellant filed his complaint against appellees, in the Allen Circuit Court, for the specific performance of an alleged contract, so much of such complaint as is necessary for this decision being as follows:

"The above-named plaintiff complains of the above-named defendants and says: That on the 28th day of September, 1916, this plaintiff was the owner of lot 52, and the east 2 feet of lot 51, in Thompson's Second addition to the city of Fort Wayne, Allen county, Indiana, and also, the west 48 feet, of block 4, and the west 48 feet of the north ½ of block 3, all in Evans' Place, in the city of Fort Wayne, Allen county, Indiana, the last-described property being known as No. 1129 Maple avenue, in said city of Fort Wayne. That at said time said defendants were the owners in fee simple of lot 1 in Ninde's Second addition to the city of Fort Wayne, Allen county, Indiana, ex-



cepting therefrom such portion as was taken off for the widening and straightening of Taylor street, in said city. That on the 28th day of September, 1916, this plaintiff and said defendants entered into a certain written agreement, portions of which agreement bear date of September 26th, whereby in consideration of mutual covenants and agreements, said defendants promised and agreed that they would convey to this plaintiff in fee, by warranty deed, said lot No. 1 in Ninde's Second addition to the city of Fort Wayne, Allen county, Indiana, in consideration whereof this plaintiff promised and agreed to convey to said defendants in fee simple, by warranty deed, the said real estate first herein described as belonging to said plaintiff. That on said 28th day of September, 1916, after said defendants had had possession of said portions of said written contract bearing date of September 26th, and which provided that the deal was to be closed before October 1, 1916, and on signing such portions of said agreement and as a consideration for the closing of said contract, this plaintiff executed and delivered to said defendants that portion of said contract contained on the third page of said contract, by which plaintiff agreed to do certain repairs to the buildings on the property which he was exchanging to said defendants. A copy of said written contract is filed herewith, made a part of this complaint, and marked Exhibit "A," 1, 2 and 3. Plaintiff further alleges that he duly performed all the conditions of said contract and agreement to be by him performed. That he did fix the roof and put in the bath fixtures and light wires and performed all other requirements of said contract on his part to be performed \* \* \* and thereupon plaintiff

executed his warranty deeds, plaintiff's wife joining therein, conveying plaintiff's said real estate to said defendants in accordance with the terms of said contract, and then and there demanded of said defendants a deed for their said above-described real estate so to be conveyed to this plaintiff; that plaintiff's said warranty deeds were properly acknowledged and this plaintiff tendered to said defendants said warranty deeds, and said defendants refused to accept said deeds so tendered, and refused to execute a deed for their real estate or to deliver the same to this plaintiff, and still refuse to do so but, on the contrary, refuse to be bound by their said contract. \* \* \* Wherefore, plaintiff demands judgment that said defendants be decreed to specifically perform said agreement. \* \* \*

**Exhibit "A" 1**

**"Fort Wayne, Indiana.**

**September 26, 1916.**

**"I, the undersigned, agree to sell, trade and convey by warranty deed and good title, Lot No. 1 in Ninde's 2nd addition in this city of Fort Wayne, Ind. and will take in trade lot No. 52 Thompson's 2nd add. lot 38 and 170, and one house and lot 1129 Maple ave. lot 48-150 both in the city of Fort Wayne, Ind. and will assume or agree to pay a mortgage of \$2,300. on Scott ave. home and \$1,100. on Maple ave. home. Will also pay interest on \$5,600. mortgage up to date of transfers and pay this fall tax on lot No. 1 and will give and take possession in 30 days from date of transfers. If this deal is made it must not be later than October 1, 1916. P. S. The**

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street pavement is to be assumed by me in Scott ave. and Maple ave.

“ ‘John Korn  
Elizabeth Korn.’

Exhibit “A” 2

“ ‘Fort Wayne, Indiana.  
September 26, 1916.

“ ‘I, the undersigned, agree to sell, trade and convey by warranty deed and good title lot No. 52 in Thompson’s 2nd addition in the city of Fort Wayne, Indiana, and house and lot on Maple ave. No. 1129, in Ft. Wayne, and will pay the interest on said loans up to date of transfers, and pay this fall tax on same. Mortgages on Scott ave. of \$2,300.00. Maple ave. \$1,100. and will take in trade lot No. 1 in Ninde’s 2nd add. in the city of Fort Wayne, Ind. and will assume or agree to pay the mortgage of \$5,600. on same, and will give and take possession in 30 days from transfers. If this deal made is closed, it must not be later than October 1, 1916. P. S. I am to assume the Taylor St. pavement, of equal amount.

“ ‘J. R. Feichter.’

Exhibit “A” 3

“ ‘Fort Wayne, Indiana, Sept. 28, 1916.

“ ‘Scott ave. house.

I, the undersigned, agree to fix the roof so it will not leak. Put in new stool. Fix water pipes and wires, in fact have house cleaned out from cellar to garret and have same put in good condition.

“ ‘J. R. Feichter.’ ”

Appellees filed their demurrer to this complaint, with memorandum, which was sustained by the court, and, appellant refusing to plead further and electing to stand on his complaint, judgment was rendered for appellees and that appellant take nothing by his suit.

The court's ruling on the demurrer to the complaint is the only error assigned in this court.

Appellant insists that the exhibits to the complaint taken together constitute the contract, the specific performance of which he seeks in this action.

1. There is no reference whatever in any one of these instruments to either of the others, and without such reference, under the statute of frauds which requires that all contracts for the sale of real estate shall be in writing, they cannot be construed together as constituting the contract, for extrinsic evidence cannot be heard to show their relation each to the others. The evidence of the relation must be within the instruments themselves. Many authorities sustain this principle, among which we cite *Graham v. Henderson Elevator Co.* (1916), 60 Ind. App. 697, 111 N. E. 332, which contains a full discussion of the question, and cites numerous authorities.

Appellant says that appellant and appellee entered into "a certain written agreement," of which the exhibits are a copy, but these exhibits, whether

2. taken together or separately, do not constitute a written agreement, and, if there is a variance between the pleading and the exhibits, the latter must prevail and control. *Watson Coal, etc., Co. v. Casteel* (1881), 73 Ind. 296. Taken separately and independently, for this is the only way we can consider them under the above rule, there being no internal reference from any one to the

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others, if the appellees are to be charged, it must be by Exhibit A-1, for it is the only one signed by them. This exhibit provides that "if this deal is made, it must be not later than October 1, 1916." Certainly this is not the language of a final agreement the specific performance of which can be enforced. The most that can be said of the instrument with such a provision is that it was an offer that must be accepted not later than October 1, 1916. There is no averment in the complaint of any act that can be said to have been an acceptance of such offer within the time given, hence there was no contract of sale. Other questions are ably discussed by counsel, but we deem it unnecessary to consider them.

There was no error in sustaining the demurrer. The judgment is affirmed.

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MENSER v. MARSHALL FARMERS' HOME FIRE INSURANCE  
COMPANY.

[No. 9,700. Filed February 12, 1919. Rehearing denied May 15, 1919.]

INSURANCE.—*Fire Insurance.—Waiver of Conditions.—Burden of Proof.*—In an action on a fire policy providing that the insurer would not be liable for fire damage to any dwelling house while unoccupied, unless the policy was continued in force during such vacancy by the written consent of a director of the company, the burden of showing insurer's alleged waiver of the vacancy provision by a retention of unearned premium was on the insurer, and the absence of a finding as to the existence of any unearned premium must be construed to mean that all sums paid to the insurer were fully earned.

From Marshall Circuit Court; *Smith N. Stevens*,  
Judge.

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Action by Moses Menser against the Marshall Farmers' Home Fire Insurance Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Charles Killison*, for appellant.

*Lauer & Kitch*, for appellee.

REMY, J.—This action is based on a policy of fire insurance issued to appellant by appellee company. The trial court made a special finding of the facts in issue, and stated its conclusions of law in favor of appellee. Exceptions to these conclusions present the only question on appeal.

The special findings are long, and there is no occasion here to consider them in detail. It appears from such findings, however, that at the time the policy in question was issued, that instrument, and the constitution of appellee company, which is a mutual organization, contained a provision to the effect that appellee "shall not be liable for any loss or damage by fire occurring to any dwelling house, while the same is unoccupied, although goods or furniture be stored or left therein. But the insured may apply to the director of his township who is authorized to continue the policy in force by written consent if he considers it advisable; not, however, to exceed sixty days, otherwise such vacancy voids the insurance on such dwelling during vacancy."

The loss in this case was occasioned by the destruction of a dwelling; and it is found specially that, at the time, the house was unoccupied within the meaning of the above provision, and that no vacancy permit was either applied for or issued. Appellant contends, however, that these circumstances served only to ren-

der the policy voidable at the option of appellee, and that, to render the provision effective, the burden rested on appellee, as soon as it had discovered the facts, to notify appellant of its intention to avoid the policy, and to tender back the unearned premium. The special findings show that on April 29, 1914, within five days after the loss, and continuously thereafter, appellee denied liability on the ground that the dwelling in question was unoccupied at the time of the fire. There is no finding as to the existence of any unearned premium at the time; but the court did find that subsequently to the loss, and shortly before the bringing of this action, appellant paid to the Plymouth State Bank the sum of \$4.52, as the amount of his assessment with appellee company in the year 1914; that the bank was authorized to accept payment of assessments due appellee, but, finding no assessment charged against appellant, the bank accepted said sum for the use of appellee as its interest should thereafter appear; that immediately on learning of this payment, appellee company tendered back to appellant all of said sum of \$4.52, except an amount which was understood to be for the insurance of certain personal property owned by appellant, and not involved in his present claim; that this tender was refused, for reasons not going to the sufficiency thereof, and has been kept good by a payment into court for the benefit of appellant. The special findings further show that when appellant applied for insurance with appellee company, on June 21, 1912, he paid the sum of \$2.26 in part consideration therefor, but there is no finding that any part of this sum was unearned at the time of the loss in controversy. The burden of showing a waiver of the vacancy provision in the

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policy, through a retention by appellee of unearned premium, rested on appellant, and the absence of a finding to that effect must be construed to mean that all sums which had been paid to appellee were fully earned. Taken as a whole, the special findings sustain the conclusions of the trial court.

Judgment affirmed.

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INDIANA TRAVELERS' ACCIDENT ASSOCIATION v.  
DOHERTY.

[No. 9,650. Filed May 15, 1919.]

1. **APPEAL.**—*Decisions Reviewable.*—*Dismissal of Cause.*—An order of court dismissing a cause is a final judgment from which an appeal may be taken. p. 216.
2. **APPEAL.**—*Decisions Reviewable.*—*Dismissal of Application to Set Aside Default Judgment.*—*Final Judgment.*—An order that an application and motion filed under §405 Burns 1914, §396 R. S. 1881, "be, and the same is now and hereby dismissed," put an end to the controversy between the parties as far as could be done by the trial court, and was a final judgment from which an appeal lies. p. 217.
3. **JUDGMENT.**—*Default.*—*Setting Aside.*—*Statute.*—*Liberal Construction.*—Section 405 Burns 1914, §396 R. S. 1881, relative to setting aside judgments taken through defendant's mistake, inadvertence, surprise, or excusable neglect, is remedial, and must be liberally construed and applied. p. 217.
4. **JUDGMENT.**—*Default.*—*Setting Aside.*—*Statute.*—*Duty of Court.*—Under §405 Burns 1914, §396 R. S. 1881, it is the imperative duty of the court to set aside a default and permit a trial upon the merits, when it appears from the uncontradicted facts of the application for relief that the defaulted party has a meritorious defense, and that his failure to appear and defend was due to his excusable neglect. p. 218.
5. **JUDGMENT.**—*Default.*—*Setting Aside.*—*Pleading.*—Even if it was necessary that a proceeding under §405 Burns 1914, §396 R. S. 1881, for relief from a default should be instituted by complaint



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or petition, where commenced after term, defendant's motion to set aside a default, supported by affidavits, filed after term, to which application plaintiff appeared after due notice, will be treated as a complaint or petition. p. 218.

6. JUDGMENT.—*Default.—Setting Aside.—Application.—Sufficiency.*—In a proceeding under §405 Burns 1914, §396 R. S. 1881, to set aside a default judgment rendered in an action on an accident insurance policy, uncontradicted facts set forth in defendant's application for relief held to show a meritorious defense, and that failure to appear and defend was due to defendant's excusable neglect within the terms of the statute. pp. 219, 221.
7. JUDGMENT.—*Default.—Setting Aside.—Excusable Neglect.*—What constitutes excusable neglect within the meaning of §405 Burns 1914, §396 R. S. 1881, providing that a party may be relieved from a judgment taken against him through excusable neglect, is to be determined from the particular facts of each case, and, where there is any doubt as to the sufficiency of the showing of excusable neglect and inadvertence, the doubt should be resolved in favor of the application. p. 221.

From Vigo Superior Court; *Fred W. Beal*, Judge.

Action by Mary L. Doherty against the Indiana Travelers' Accident Association. Default judgment for plaintiff, and from an order dismissing defendant's motion to set aside the default, the defendant appeals. *Reversed.*

*William S. McMaster* and *Stevenson & Stevenson*,  
for appellant.

*Stimson, Stimson, Hamill & Davis*, for appellee.

REMY, J.—As the beneficiary named in an insurance policy issued by appellant association, appellee recovered a judgment against appellant for \$5,000 for the alleged accidental death of the insured, who was her husband. The judgment was rendered by default. At a subsequent term of court appellant filed its motion, supported by affidavits of its secretary and its attorney, for relief from said judgment, which motion was based upon the claim that the judgment

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was taken through appellant's mistake, inadvertence, surprise and excusable neglect. In opposition to appellant's said motion for relief, appellee filed the counter affidavit of one of its attorneys. Subsequently to the filing by appellee of the counter affidavit, and before the court passed upon appellant's application for relief from the judgment, appellee filed her motion to dismiss said application, which motion was sustained by the trial court on November 18, 1915, and entry of the action of the court was made by the clerk of the court. On December 28, 1915, the cause was formally dismissed, the court's order of dismissal being as follows: "Come again the parties and the court having heretofore sustained plaintiff's motion to dismiss defendant's application and motion to set aside the default and judgment heretofore rendered in this cause, it is now therefore ordered by the court that the said application and motion of defendant Indiana Travelers' Accident Association, to set aside the default and judgment heretofore rendered in this cause on December 18, 1914, be, and the same is now and hereby dismissed, to which order of the court of dismissal the defendant Indiana Travelers' Accident Association, at the time objects and excepts."

From this order appellant has appealed to this court. Appellee has moved to dismiss this appeal on the ground that the entry from which the appeal was taken is not a final judgment from which, under the statute, an appeal will lie.

It is well settled that an order of the court dismissing a cause is a final judgment from which an appeal may be taken. *Koons v. Williamson* (1883),

1. 90 Ind. 599; *McGraw v. Nickey* (1911), 47 Ind. App. 159, 93 N. E. 1003. A final judgment has

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been defined as "one which determines the rights of the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for future determination." Ewbank's Manual (2d ed.)

§82. The test is that it puts an end to the particular case, or branch of it, as to all the parties and all the issues. While the entry of the court in the case at bar does not formally state that the dismissal

2. is "ordered, adjudged and decreed" by the court, nevertheless the court by the entry specifically orders that appellant's application and motion to set aside the default and judgment "be and the same is now hereby dismissed." This put an end to the controversy between the parties so far as the court could end it, and was a final judgment. *Koons v. Williamson, supra*. Appellee's motion to dismiss the appeal is overruled.

Appellant's application to set aside the default was prepared and filed in accordance with the provisions of §135 of the Code of Civil Procedure of this state (§405 Burns 1914, §396 R. S. 1881), which provides: "The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years."

This statute is remedial in its character, and must be liberally construed and applied, to the end that no advantage shall be obtained by one party to

3. the litigation by reason of any mistake, inadvertence, or excusable neglect of the other

party. *Dennis v. Scanlon* (1918), 66 Ind. App.

4. 453, 118 N. E. 370, and cases cited. Under this statute it is the imperative duty of the court to set aside the default, and permit a trial upon the merits, when it appears from the uncontradicted facts of the application for relief that the defaulted party has a meritorious defense, and that his failure to appear and defend was due to his excusable neglect. *Bush v. Bush* (1874), 46 Ind. 70; *Wellinger v. Wellinger* (1906), 39 Ind. App. 60, 79 N. E. 214. Appellant asserts that the undisputed facts set forth in its application were such that it was not within the court's discretion to deny it the relief asked, and that the dismissal of its application and motion was reversible error. On the other hand, appellee contends that her motion to dismiss the application for relief from the judgment was properly sustained.

It is especially urged by appellee that, inasmuch as appellant's application for relief was filed at a time subsequent to the term of court when the

5. default and judgment were taken, such application should have been by formal complaint and not by motion, citing *Brumbaugh v. Stockman* (1882), 83 Ind. 583. It appears from the record that appellant at a subsequent term appeared in the court where the default had been taken, and, having moved that the original cause be redocketed, filed its proceeding for relief, giving notice to appellee, who appeared and filed a counter affidavit, and later the motion to dismiss. The statute specifically provides that the application may be "by complaint or motion filed within two years." It is admitted that the proceeding was begun within the period fixed by the statute. The *Brumbaugh* case, *supra*, was a case very

similar to the case at bar, and, while the Supreme Court in that case stated that, if the proceeding was commenced at a term of court after the judgment was rendered, the proper practice was by complaint or petition, nevertheless the court held that the application was sufficient, and so held on the ground that it amounted to a petition supported by affidavit to which there was an appearance after notice. So in the instant case, if it could be said that the law required the proceeding to be instituted by complaint or petition, then, under the holding of the Brumbaugh case, appellant's application to which appellee appeared after due notice must be treated as such a pleading. See, also, *Lake v. Jones* (1874), 49 Ind. 297.

The remaining question for our consideration is: Do the uncontradicted facts pleaded in appellant's application for relief from the default and

6. judgment show that appellant has a meritorious defense, and that its failure to appear and defend was due to his excusable neglect? The material facts set forth in the application, and which are not contradicted by appellee's counter affidavit, are as follows: The original action was commenced October 29, 1914, in the Superior Court of Vigo county, Indiana, and summons was on said day issued and directed to the sheriff of Marion county in said state, commanding such sheriff to summon appellant to appear November 10, 1914, and answer appellee's complaint. The service was by copy left at appellant's offices, but instead of summons to appear in the Vigo Superior Court, it was erroneously copied, directing appellant to appear in the Vigo Circuit Court. Upon investigation appellant through its attorney learned that the cause was not pending in the Vigo Circuit

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Court, but was pending in the superior court of that county, and notified the clerk of the Vigo Superior Court, and also appellee's attorney, of the mistake in the summons. Whereupon said attorneys caused a second summons to issue, which, when served by said sheriff of Marion county, showed the same mistake to have been made. The sheriff had by mistake left a copy of summons which commanded appellant to appear in the Vigo Circuit Court, but made return showing service of appellant to appear in the superior court of that county. Thereupon appellant's attorney, who resided in Indianapolis, not knowing that a mistake had been made in the second summons, but believing the cause might have been refiled in the Vigo Circuit Court, immediately called the clerk of said court by long distance telephone, advising said clerk of the character of the last summons; and in response said clerk stated that doubtless a mistake had been made in his office, he being the clerk of both of the said courts of said Vigo county. Appellant's attorney also wrote two letters to appellee's attorneys, advising them that appellant's summons was to appear in the Vigo Circuit Court, and in the last letter asked if the action had been refiled in that court. Appellee's attorneys, on December 17, 1914, replied that the cause had not been refiled in the circuit court, and on the following day took the default judgment in the Vigo Superior Court, knowing at the time that appellant had not been summoned to appear in that court, and knowing that appellee was at the time relying upon the integrity of the sheriff's certificate that the instrument served was the true and correct copy of the original writ as it came into his hands. Appellant's application for relief further shows that

appellant had meritorious defenses to appellee's complaint in that the policy sued on indemnified only against disability or death sustained through accidental means, and that the insured named in the policy came to his death by suicide, and that no notice or proof of death of the insured had been made to appellant in accordance with the terms of the policy. That appellant's application for relief shows a meritorious defense is not controverted. What is excusable neglect within the meaning of the statute is to be

7. determined from the particular facts of each case (*First Nat. Bank v. Stilwell* [1912], 50 Ind. App. 226, 98 N. E. 151), and, where there

6. is any doubt as to the sufficiency of the showing of excusable neglect and inadvertence, the doubt should be resolved in favor of the application. *Masten v. Indiana Car, etc., Co.* (1900), 25 Ind. App. 175, 57 N. E. 148. The uncontradicted facts show that appellant was never summoned to appear in the court where the cause was pending, and that appellee's attorneys knew that fact when the default was taken and judgment rendered. We conclude that the trial court erred in dismissing appellant's application for relief from the judgment, and that justice requires that the default and judgment be set aside, and appellant be permitted to be heard.

Judgment reversed, with instructions to set aside said default and judgment, to permit appellant to answer the complaint in the original action, and for further proceedings therein.

## ELMORE v. BRINNEMAN ET AL.

[No. 9,855. Filed May 15, 1919.]

1. STATUTES.—*Construction.—Words.—Meaning.—Common Law.*—In the construction of statutes, the court will look to the meaning attached to the words and terms used therein by the common law, and they will be deemed to be employed in their known and defined common-law meaning. p. 224.
2. BROKERS.—*Real Estate Brokers.—Exchange of Land.—Commissions.—Necessity of Written Contract.—Statute.*—Under §7463 Burns 1914, Acts 1913 p. 638, providing that no contract for the payment of a commission for the finding or procuring of a purchaser for real estate shall be valid unless the contract is in writing, a real estate broker cannot recover a commission upon an oral contract for bringing about an exchange of land, since the term "purchaser," as used in the statute, includes one who acquires title to lands in an exchange of realty. p. 225.

From Wells Circuit Court; *William H. Eichhorn*, Judge.

Action by Daniel T. Brinneman and another against Charles A. Elmore. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

*Frank W. Gordon*, for appellant.

*Abram Simmons* and *Charles G. Dailey*, for appellees.

NICHOLS, J.—This was an action brought by the appellees against the appellant to recover commission for the exchange of real estate owned by the appellant, for other real estate which appellees, as brokers, had for exchange. The complaint was in two paragraphs, to each of which the appellant filed a demurrer, which demurrers were each overruled, and to which ruling the appellant excepted. Appellant then filed a general denial, and the cause, being at issue,



was submitted to a jury for trial, and there was a judgment in favor of the appellees for \$100. After motion for a new trial, which was overruled, the appellant now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling the demurrer to the first paragraph of complaint; (2) overruling the demurrer to the second paragraph of complaint; (3) overruling the motion for a new trial.

The substance of the second paragraph of complaint, so far as is necessary for this decision is as follows: The appellant was the owner of certain real estate in Wells county, Indiana, in the complaint described, which he was desirous of exchanging for other real estate situate in Wells county, in the complaint described. Appellant placed his real estate with the appellees and directed them to exchange the same for the real estate which he desired as above mentioned, a cash difference to be paid to appellant of \$500. Appellant agreed to pay appellees \$100 if they were able to induce the owner of the second mentioned tract to exchange the same for appellant's lands upon the terms stated. The appellees induced such owner so to trade his farm for the one owned by the appellant, paying the cash difference of \$500, and such exchange actually took place as the result of the efforts of the appellees. The complaint alleges nonpayment, and that the amount agreed upon is due and unpaid. The first paragraph of the complaint is substantially as the second, though not so specific.

The appellant contends that, under §7463 Burns 1914, the contract, being an oral contract, is not valid, and that there can be no recovery upon it. This section was originally enacted March 5, 1901, at which

time it was as follows: "That no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative." The section was amended by the act of March 5, 1913, §7463 Burns 1914, Acts 1913 p. 638, by adding a proviso thereto, which, however, does not affect it as to the question involved in this action. If this section covers a sale or purchase of real estate for a money consideration only, the demurrers were properly overruled, but if it includes also an exchange of real estate, then the demurrers should have been sustained. Before the enactment of this section, the Supreme Court of this state in the case of *Falley v. Gribbling* (1891), 128 Ind. 110, 26 N. E. 794, had adopted Washburn's definition of the word "purchase" (See 3 Washburn, Real Property [6th ed.] §1824, p. 3), which defines it as including every mode of acquiring an estate known to the law, except that by which an heir, on the death of his ancestor, becomes substituted in his place, as owner, by operation of law. At the time of such enactment, Webster's Dictionary defined a purchaser as being one who acquires an estate in lands by his own act or agreement, or who takes or obtains an estate by any means other than by descent or inheritance. See, also, *Roberts v. Shroyer* (1879), 68 Ind. 64.

The terms "sale" and "purchase" are correlative terms. By the statute of frauds, §7462 Burns 1914, §4904 R. S. 1881, any contract for the sale of

1. lands, to be valid, must be in writing, and signed by the party to be charged therewith.

Under this section it was held in the case of *Bradley v. Harter* (1901), 156 Ind. 499, 506, 60 N. E. 139, that an oral agreement to accept conveyances of other lands in consideration for lands sold is open to the objection of the statute of frauds. The legislature is presumed to have had these holdings of the court in mind at the time of the enactment of the section of the statute here involved, and to have used the words therein with a meaning in harmony with that given by the courts. In the construction of statutes and in determining the meaning of the words and terms employed, we are to look to the meaning attached to such words and terms by the common law, and they are deemed to be employed in their known and defined common-law meaning. *Truelove v. Truelove* (1909), 172 Ind. 441, 86 N. E. 1018, 88 N. E. 516, 27 L. R. A. (N. S.) 220, 139 Am. St. 404. Under this interpreta-

tion of the law, the legislature must have intended that the finding of a purchaser for real estate included, not only the finding of some one who would pay a money price for the real estate offered for sale, but as well any one who by his own act was ready to acquire title to such real estate, by the payment of a valid consideration therefor, whether in money or other thing of value. It has recently been held by this court, in the case of *Boyd v. Greer* (1919), *ante* 77, 123 N. E. 122, that the sale of land may take the form of an exchange, and that when this is done, in the absense of fraud, it has the same legal effect as if the agreed value thereof has been paid in money. In the case of *Herr v. McConnell* (1918), 67 Ind. App. 529, 119 N. E. 496, the following contract, omitting caption and signatures, was involved: "I hereby agree to pay to John McConnell

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Two Dollars and 50 cents per acre for trading my 615 acre farm at Hopkins Park, Ills. for garage at Hoopeston, Ills. when deal is closed," and the court, in speaking of it, said that the section involved, being said §7463, *supra*, provides that contracts of the kind involved in that case shall not be valid unless the same shall be in writing and signed by the owner of such real estate. Under these authorities it is clear that the legislature intended that the purchaser may be not only one who was ready to pay a money consideration for real estate conveyed to him, but that he may as well be one ready to exchange his real estate, or other property, in consideration therefor.

With this view of the law, we hold that an action cannot be maintained upon the oral contract which was the basis of this action.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to each paragraph of the complaint.

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COONSE AND CAYLOR ICE COMPANY v. HOME STOVE  
COMPANY.

[No. 9,595. Filed December 19, 1918. Rehearing denied March 14, 1919. Transfer denied May 16, 1919.]

1. **MECHANICS' LIENS.**—*Subcontractors and Materialmen.*—*Right to Lien.*—The mechanics' lien statute gives to the subcontractor, laborer and materialman an absolute lien for material, or labor, and such lien is not affected by the mere failure of the principal contractor to perform his contract, or by the cancellation or rescission thereof, or by the removal of the work or payment of the principal contractor. p. 229.
2. **PLEADING.**—*Answer.*—*Grounds of Demurrer.*—In a subcontractor's action to foreclose a mechanic's lien for the installation of certain parts of a stoker, an answer is not demurrable on the

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ground that it proceeds both upon the theory of a counterclaim and an answer, if the pleading contains averments sufficient under either theory. p. 231.

3. **FRAUDS, STATUTE OF.—Default of Third Person.—Subcontractor's Guaranty.**—In a subcontractor's action to foreclose a mechanic's lien, where defendant answered that the plaintiff was a party to, and a partner in, the principal contract, and was to share in the profits, and that he had guaranteed that a certain appliance to be installed in defendant's factory by the principal contractor would do the work for which it was sold, the answer was good, even though the guaranty was not in writing, since, under the facts alleged, it was not a promise to answer for the debt, default or miscarriage of another. p. 232.
4. **MECHANICS' LIENS.—Lien of Subcontractor.—Defenses.—Removal of Material Furnished.**—Where, in a subcontractor's action to foreclose a mechanic's lien, defendant set up that plaintiff was in fact a partner of the principal contractor and was to share in the profits of the principal contract, and had guaranteed that the appliance to be installed in defendant's factory would do the work for which it was sold, it was a defense that the materials furnished by plaintiff had been removed, as not complying with the guaranty. p. 232.

From Marion Superior Court (93,615); *Linn D. Hay*, Judge.

Action by the Home Stove Company against the Coonse and Caylor Ice Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Clarke & Clarke*, for appellant.

*Delos A. Alig*, for appellee.

**HOTTEL, J.**—This is an appeal from a judgment in appellee's favor for \$324.79 and for the foreclosure of a mechanic's lien. The issues of fact are presented by an amended complaint and an answer in three paragraphs, the first of which is a general denial.

The trial court overruled a demurrer to the complaint, sustained a demurrer to the third paragraph of answer, and overruled a motion for new trial. Each

of these several rulings are separately assigned as error and relied on for reversal.

In support of its contention that error is presented by the ruling on the demurrer to the complaint, it is contended in effect that such complaint is bad because of the absence of a showing that the terms of the contract between appellant and the principal contractor were complied with; that this is so because appellee, a subcontractor, is bound by the terms of the principal contract.

It is also insisted that such complaint is bad because of the absence of any averment showing that anything is due the principal contractor on his contract.

As pertinent to the question involved in the last contention, it may be said that authority can be found that apparently gives support to appellant's contention. It should be noted, however, in this connection that what may appear to be conflict in the decisions affecting said question, in the main, results from the difference in the system of mechanic's lien laws in the different jurisdictions from which the decisions emanate. In New York and other jurisdictions which follow what is sometimes called the "New York System," no one except the principal contractor acquires an absolute lien on the real estate upon which the improvement is made, and the rights of the subcontractor, laborer and materialman are acquired by a kind of equitable subrogation secured by written or record notice to the owner of their unpaid claims, and the lien thus acquired imposes upon the owner the duty of retaining such funds as are in his hands belonging to the contractor at the time of such notice. In such jurisdictions the subcontractor, laborer and

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materialman are limited in their recovery to the amount due from the owner to the contractor. Phillips, Mechanic's Liens §33a; 27 Cyc 89; 20 Am. and Eng. Ency. Law (2d ed.) 446.

Indiana, however, has adopted what is known as the "Pennsylvania System," in that our statute gives to the subcontractor, laborer and mate-

1. rialman an absolute lien for the material, or labor, furnished in accord with the provisions of the act and asserted and created in the manner provided therein, and a lien so acquired is not affected by the mere failure of the principal contractor to perform his contract, or by the cancellation or rescission thereof, or by the removal of the work or payment of the principal contractor. *Totten, etc., Co. v. Muncie Nail Co.* (1897), 148 Ind. 372, 47 N. E. 703; *Smith v. Newbaur* (1896), 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; *City of Crawfordsville v. Johnson* (1875), 51 Ind. 397; *Colter v. Frese* (1873), 45 Ind. 96; *Taylor v. Murphy* (1892), 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. 825; *O'Driscoll v. Bradford* (1898), 171 Mass. 231, 50 N. E. 628.

The averments of the complaint pertinent to the question involved in appellant's first contention, *supra*, are as follows: "The said National Stoker Company contracted with this plaintiff for it to make the steel and iron parts of said stoker in accordance with its said contract with the defendant and to deliver and assemble the same in the boiler house of the defendant on the real estate herein described. That said plaintiff specially manufactured the steel and iron parts of said stokers in accordance with the plans and specifications of the original contract and of its subcontract with the National Stoker Company

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Coonse, etc., Ice Co. v. Home Stove Co.—70 Ind. App. 226.

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and furnished, delivered and assembled the same in the boiler house of the defendant on the real estate herein described.” These averments bring the complaint fairly within the law as declared in the cases *supra*. See, also, *Newcomer v. Hutchings* (1884), 96 Ind. 119, 122; 27 Cyc 100, 105.

The averments of appellant’s third paragraph of answer are in substance as follows: It admits ownership of the real estate involved, and that it entered into a contract with the National Stoker Company, whereby it agreed to furnish the material and perform the labor necessary to the construction and installation of an improved coal burning device or stoker, in appellant’s boiler building. It is then alleged in effect that appellee at all times knew the terms of said agreement and the use to which said stoker device was to be applied; that prior to the execution of the principal contract the appellee represented to appellant that it was well acquainted with said devise and knew that it would perform the work represented by said stoker company, and appellee guaranteed that such stoker would in all things comply with the purposes for which it was to be installed, and thereby induced appellant to enter into said principal contract; that, at the time of the making of the principal contract, appellee was a partner of such principal contractor, and had then entered into a contract with it whereby it was to share in the profits of said sale to appellant, and at the time of the execution of the principal contract appellee was in fact a party therein, and that such principal contract was in fact a contract between appellant and appellee; that appellee and the stoker company furnished and installed said stoker in appellant’s plant, and appel-



lant in all things complied with the terms of said contract and permitted said stoker to be installed and fully tried and tested, and it did not perform the work guaranteed by said contract and by appellee; that, on account of such failure, it became necessary to remove said stoker from said building, and all parts thereof were removed from such building, and no material furnished by appellee, or any other person in connection with said stoker, now forms any part of said building; that said stoker when first installed was installed on trial, and under said agreement was not to become a permanent part of said building unless entirely satisfactory to this defendant; that, after the removal of said stoker from said building, appellee directed appellant to pay certain sums of money to the stoker company, all of which were paid as directed and have been lost by appellant; that appellee was induced to install said stoker wholly by the representations of plaintiff; that appellee without right caused notice of its lien to be filed, etc.; that said lien is without right and is unfounded and a cloud upon appellant's title, etc. Judgment for \$. . . . ., and that the lien be ordered released, is asked.

In support of the ruling on said demurrer, it is contended by appellee that the answer is bad for duplicity and appears to proceed both upon the the-

2. ory of a counterclaim and an answer. While the pleading may be subject to criticism in the respects indicated, said objections thereto will not justify the court's ruling on said demurrer, if in fact such answer contains averments sufficient either as a counterclaim or answer.

Appellee insists, however, that said pleading does

not contain the averments necessary to make it good, either as an answer or counterclaim. This

3. contention, in the main, seems to be based upon the assumption that the guaranty relied upon in said answer is a promise to answer for the debt, default or miscarriage of another, and hence must have been in writing. The averments of the answer do not justify said assumption. On the contrary, said averments show that appellee was in fact a party to, and a partner in, said principal contract and was to share in the profits thereof, and his guaranty was in effect that the stoker to be installed by the principal contractor was fit for and would answer the purposes and do the work for which it was sold.

It is also insisted that it is no defense that the material furnished by appellant had been removed.

This would be true if appellant occupied the  
4. position of an independent subcontractor, but, as before stated, the averments of said answer clearly make him a party to the principal contract, and show further that said stoker was in effect guaranteed to perform the work for which it was sold; that it was installed on trial with the understanding that it was not to become a permanent part of said building unless entirely satisfactory to appellant, and that appellee was a party to said agreement. These facts make a case very different from the cases involved in the authorities cited and relied on by appellee. It seems to us clear that the answer here involved contains averments sufficient to show a good defense to appellee's cause of action, and hence that error resulted from the overruling of the demurrer thereto.

This conclusion makes it unnecessary to discuss or determine the questions presented by the ruling on the motion for new trial.

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For error in sustaining the demurrer to said answer, the judgment of the trial court is reversed, with instructions to such court to overrule said demurrer, and for further proceedings not inconsistent with this opinion.

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BALTES ET AL. v. ARMOUR LEATHER COMPANY.

[No. 9,824. Filed May 27, 1919.]

1. *APPEAL.—Questions Presented.—Ruling on Demurrer.—Briefs.*—No question is presented for review on appeal by an assignment of error in overruling a demurrer, where neither the demurrer nor the memorandum filed therewith is set out in appellant's brief. p. 235.
2. *CORPORATIONS.—Indebtedness of Insolvent Corporation.—Failure to Collect Stock Subscriptions.—Liability of Directors.—Statutes.*—In an action against the directors of an insolvent corporation under §5104 Burns 1914, §3868 R. S. 1881, making the directors of a corporation organized under the mining and manufacturing act liable for all debts of the corporation contracted after insolvency resulting from its violation of the act, provided the directors directed or assented to such violation, wherein the right of recovery was based on the alleged failure of the directors to comply with §5089 Burns 1914, §3859 R. S. 1881, requiring the capital stock, as fixed by the company, to be paid into the treasury within eighteen months, findings including facts showing that defendant directors assented to the company's failure to collect stock subscriptions and as a result thereof the corporation became insolvent, and that thereafter it became indebted to plaintiff, *held* sufficient to sustain the conclusion of law that defendants were liable. p. 235.

From Dekalb Circuit Court; *Dan M. Link*, Judge.

Action by Armour Leather Company against Michael Baltes and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Vesey & Vesey*, for appellants.

*Albert E. Thomas and Howard L. Townsend*, for appellee.

ENLOE, J.—This was an action by appellee to recover of and from the appellants the amount of a certain indebtedness then owing, and theretofore contracted by the Cushion Heel Shoe Company, a corporation organized under the laws of the State of Indiana, with the appellee herein. The appellants had been directors of said corporation at the time the grievances complained of were committed.

The complaint was brought under the provisions of §5104 Burns 1914, §3868 R. S. 1881, and, among other things, alleged the due organization of said corporation; that its capital stock was \$200,000; that at the time of the organization of said corporation more than \$100,000 of its stock had been subscribed; that the defendants were the directors of said corporation; that said directors and said company wholly failed to collect the amount of said subscriptions, or the amount of the capital stock as fixed by said company, and put the same in the treasury thereof; that said defendants as directors assented to such failure to collect said subscriptions; that by reason of such failure said corporation became insolvent; that thereafter, and while so insolvent, it became indebted to the plaintiff, etc. A demurrer to the complaint was overruled.

The cause was tried by the court, which, upon request, made a special finding of the facts and stated its conclusions of law thereon, favorable to the appellee, and rendered judgment accordingly.

The errors assigned are: (1) That the court erred in overruling the demurrer to complaint; and (2) that

the court erred in its conclusions of law upon the facts found.

As neither the demurrer nor the memoran-

1. dum accompanying same is set out in appellant's brief, no question is presented to us on this ruling.

Section 5089 Burns 1914, §3859 R. S. 1881, provides: "The capital stock, as fixed by such company, shall be paid into the treasury thereof, within eighteen months from the incorporation of the same, in such installments as the by-laws of the company assess and direct."

Section 5104 Burns 1914, *supra*, provides: "If any company organized and established under the authority of this act, and of the act to which this is supplementary, shall violate any of the provisions thereof, and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable, in an action founded on said acts, for all debts contracted after such violation as aforesaid."

The trial court found, among other things, that on February 14, 1910, the board of directors of said Cushion Heel Shoe Company, by a resolution

2. of said board, unanimously adopted, declared that, "because of noncompliance of the terms and conditions of the obtaining subscriptions to the capital stock of said company, all subscriptions *are now declared null, void and cancelled.*" (Our italics.)

The court further found that the said corporation was, at the time the indebtedness herein sued for was contracted, insolvent, and that such insolvency was brought about by the failure of its board of directors to collect the subscriptions for said capital stock.

The court further found: "That from the 5th day of March, 1912, and thereafter until said corporation went into bankruptcy, it was wholly insolvent, and that upon the 5th day of March, and from then until the 3rd day of June, 1912, said corporation, with the knowledge and assent of its board of directors and of the defendants, Owen N. Heaton, Michael Baltes, Dr. W. H. Johnson, August Freese, Henry Brauning, John Schweiters, and John H. Wort, members of its board of directors, purchased from the plaintiff herein, merchandise for which it became indebted to plaintiff in the sum of \$1,484.25, upon which the sum of \$296.85 has been paid," etc.

In the case of *Patterson v. Stewart* (1889), 41 Minn. 84, 90, 42 N. W. 926, 928, 4 L. R. A. 745, 749, 5 L. R. A. 745, the court, speaking of a statute similar to the statute of this state in question, said: "The object is twofold—First, to enforce diligence and fidelity on the part of corporate officers; and, second, to furnish a prompt and efficient remedy to those creditors who were, or might have been, injuriously affected by the acts of misfeasance or nonfeasance." In the same opinion it is said concerning the "assent" of such directors (p. 94): "This assent, however, need not be express. If a director knew that a violation of law was being, or about to be, committed, and made no objection when duty required him to object, and when he had the opportunity of doing so, this would amount to 'assent'."

While it is true that the court found that some of the persons who had subscribed for the stock of defendant corporation were insolvent, and therefore the amount of their subscriptions were not collectable, yet, so far as is shown upon this record, a large part

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of the stock subscriptions were collectable, and for some reason the corporation through its board of directors failed to collect the money upon them and pay it into the treasury of said company.

The conclusions of law are well sustained by the findings. *Brown v. Clow* (1902), 158 Ind. 403, 62 N. E. 1006; *Bachman v. Cooper* (1898), 20 Ind. App. 173, 50 N. E. 394.

The judgment is therefore affirmed.

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BRUCE ET AL. v. HUBBELL ET AL.

[No. 9,852. Filed May 27, 1919.]

1. JURY.—*Right to Trial by Jury.—Action on Note.*—In an action by attorneys to recover for professional services rendered in a suit for divorce, although plaintiffs could have had an equitable lien, under a complaint containing proper averments upon a note given by the husband in settlement of property rights and delivered by defendant to plaintiffs without indorsement, yet where they alleged that the note was assigned as collateral security to secure the sum due for legal services, the case was triable by jury. p. 240.
2. TRIAL.—*Motion for Venire De Novo.—Time for Filing.*—In an action against several defendants, plaintiffs' motion for a *venire de novo* was in time, though filed after judgment was rendered against one defendant, where plaintiffs were seeking relief from judgment in favor of the other defendants only, the motion being filed before rendition of such judgment, which was the final judgment in the case. p. 241.
3. TRIAL.—*Interrogatories without General Verdict.—Effect.—Statute.*—In view of §572 Burns 1914, Acts 1897 p. 128, providing that, in jury trials, the jury shall render a general verdict, but when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact, answers to interrogatories, in an action against several defendants, were without force as to two of defendants, where there was no general verdict as to them, and the judgment in their favor was a nullity. p. 241.

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4. TRIAL.—*Ventre De Novo*.—*Scope*.—A *venire de novo*, if granted, must be as to the whole case. p. 242.

From Starke Circuit Court; *W. C. Pentecost*, Judge.

Action by Milo M. Bruce and another against Mary E. Hubbell and others. From the judgment rendered, the plaintiffs appeal. *Reversed*.

*W. Vincent Youkey, Oscar B. Smith and Otto J. Bruce*, for appellants.

*C. W. Barker and William F. Reed*, for appellees.

NICHOLS, P. J.—This action is to recover a balance due appellants as attorneys for professional services rendered by them for appellee Mary E. Hubbell, in a suit by her for divorce against appellee Lewis W. Hubbell, and to enforce the collection of a note executed by appellees Lewis W. Hubbell and Joseph L. Beesley to appellee Mary E. Hubbell, in the sum of \$500, which note, it is alleged, was assigned and delivered by said Mary E. Hubbell, without indorsement, to appellants as collateral security for the balance due them as aforesaid, and out of the proceeds of which said note appellants seek to enforce the collection of their demand against said Mary E. Hubbell.

The complaint was in two paragraphs, upon which issues were formed, and, after demand by appellants that the cause be tried by the court without the intervention of a jury, which demand was overruled, the cause was submitted to a jury for trial, which returned a general verdict in favor of appellants, against appellee Mary E. Hubbell, for \$225, with sixteen interrogatories submitted by the court, and their answers thereto. There was no general verdict against appellees Lewis W. Hubbell and Joseph L.



Beesley. On October 20, 1916, judgment was rendered in favor of appellants, and against appellee Mary E. Hubbell, on the general verdict against her, for \$225 and costs. On October 27, 1916, appellants filed their motion for a *venire de novo*, which was overruled, and thereafter on said date the court rendered final judgment that appellants take nothing on their complaint against appellees Lewis W. Hubbell and Joseph L. Beesley, and that said appellees recover costs of appellants. From this judgment this appeal is prosecuted.

The errors assigned as grounds for a new trial, and which are considered in this opinion, are: (1) Overruling appellants' demand for trial by court instead of jury; (2) overruling appellants' motion for *venire de novo*.

In the suit for divorce, the property rights were settled between the parties by payment of \$5,000 to appellee Mary E. Hubbell by appellee Lewis W. Hubbell, \$500 of which sum was paid in cash, and the remainder thereof by the execution of a series of nine promissory notes, each in the sum of \$500, and executed by appellees Lewis W. Hubbell and Joseph L. Beesley, the note involved herein being one of such series. As to the balance due appellants for their services, the first paragraph is upon an account stated, alleging a balance due appellants of \$225, with six per cent. interest, and \$50 for appellants' attorneys, for the collection of said note. It is averred that said appellee Mary E. Hubbell, by and through her agent (who was her son), assigned said note to appellants by delivery, without a written indorsement upon the back thereof, said note being so delivered as collateral security for the purpose of secur-

ing the payment of the sum due appellants; that said sum for services is due and unpaid, and demand for payment thereof has been made, but appellee Mary E. Hubbell fails and refuses to pay the same; and that said note is due and unpaid, and appellants have been required to employ an attorney to prosecute this cause of action.

There is a demand for judgment against appellees Lewis W. Hubbell and Joseph L. Beesley on said note, and for judgment against appellee Mary E. Hubbell for amount due appellants as stated, and that such sum be declared a lien upon the amount recovered upon the promissory note.

The second paragraph is predicated upon the *quantum meruit*, alleging a balance due of \$275, and that appellee Mary E. Hubbell delivered said note without indorsement to appellants to secure to the appellants the payment of their fee for services rendered, and that they have a lien thereon therefor.

Appellants contend that this suit is to enforce an attorney's equitable lien, which appears by each paragraph of the complaint, and that therefore the

1. action is in equity, and that it was error for the court to refuse their demand for a trial by the court without the intervention of a jury. We fully recognize the equitable right of an attorney to his lien upon the fruits of the judgment which by his labor and skill he has obtained for his client, and his right of payment out of any funds, choses in action, or other thing of value which he may hold as a result of his efforts under his employment. In this case, under a paragraph of complaint with proper averments, it is apparent that appellants could have had their equitable lien on the proceeds of the note in-

volved, regardless of the question of any agreement with their client. A full discussion of attorneys' liens is found in 6 C. J. 765. But it is averred in the complaint in this case that the note involved was assigned by delivery, without indorsement, as collateral security, to secure the sum due appellants for their services. We do not need to cite authorities sustaining the proposition that one holding a note as collateral may sue on it in his own name, without even averring that he so holds it, and that such suit is triable by a jury. The case was properly submitted to the jury for trial.

Appellees contend that the motion for a *venire de novo* is not available to appellants for the reason that it was not filed until after the judgment against

2. appellee Mary E. Hubbell. Appellants are not seeking relief from this judgment, but from the judgment rendered in favor of appellees Lewis W. Hubbell and Joseph L. Beesley, and their motion for a *venire de novo* was filed before the judgment was rendered in favor of the last-named appellees, which was the final judgment in this cause. A *venire de novo* may be granted at any time before final judgment. *Parker v. Hubble* (1881), 75 Ind. 580.

It is provided by Acts 1897 p. 128, §572 Burns 1914: "That in all actions hereafter tried by a jury, *the jury shall render a general verdict*, but in all

3. cases when requested by either party, the court shall instruct them *when they render a general verdict* to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories," etc. It had been decided by numerous authorities, before the statute above quoted, that answers to interrogatories without a general verdict

are of no force. *Eudaly v. Eudaly* (1871), 37 Ind. 440; *Taylor v. Burk* (1883), 91 Ind. 252; *Louisville, etc., R. Co. v. Worley* (1886), 107 Ind. 320, 7 N. E. 215; *Todd v. Fenton* (1879), 66 Ind. 25. Since there was no general verdict as to appellees Lewis W. Hubbell and Joseph L. Beesley, and therefore since the interrogatories were without force as to them, the judgment in their favor was a nullity. While there

4. was a general verdict as to one of the appellees, the *venire de novo* must be as to the whole case. *Maxwell v. Wright* (1903), 160 Ind. 515, 67 N. E. 267; *Wysong, Exr., v. Nealis* (1895), 13 Ind. App. 165, 41 N. E. 388. Other alleged errors are discussed, but we do not deem it necessary to consider them.

The judgment is reversed, with instructions to the trial court to sustain the motion for a *venire de novo*, and for further proceedings.

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### ORR ET AL. v. STATE OF INDIANA.

[No. 10,448. Filed May 27, 1919.]

1. INFANTS.—*Dependent Child.—Statute.*—Although uncared for by both parents, a female child under the age of seventeen years is not a dependent child within the meaning of §1642 Burns 1914, Acts 1907 p. 59, providing that any girl under the age of seventeen years, who is dependent upon the public for support, or who is destitute, homeless or abandoned, shall be deemed to be a dependent child, where she has never been a charge upon the public, nor been destitute, homeless or abandoned, but has been sheltered and cared for by a grandparent, who desires to continue such care and protection. p. 249.
2. INFANTS.—*Neglected Child.—Statute.*—A child abandoned by its parents and who was taken by the grandparents into their home and treated as a member of their own family, is not a neglected child within the meaning of §1642 Burns 1914, Acts

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- 1907 p. 59, defining a neglected child as one not having proper parental care or guardianship. p. 250.
3. INFANTS.—*Custody of Children.—Policy of State.—Province of Courts.*—It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens and making them wards of the state, but it is a legislative function, which cannot be delegated to the courts. p. 251.
  4. INFANTS.—*Neglected or Dependent Children.—Statute.—Proceedings.—Parties.*—Proceedings under §1642 *et seq.* Burns 1914, Acts 1907 p. 59, relating to dependent or neglected children, should not be prosecuted in the name of the state. p. 251.
  5. PARENT AND CHILD.—*Custody of Child.—Hearing.—Notice.*—The relation of parent and child cannot be permanently severed in a proceeding to determine the custody of the child without notice to the parent. p. 253.
  6. INFANTS.—*Custody.—Statute.*—Section 1646 Burns 1914, Acts 1907 p. 59, relating to dependent or neglected children, cannot be used for the purpose of determining a controversy between the mother and a grandparent as to who should have the custody of a child. p. 254.
  7. PARENT AND CHILD.—*Custody of Child.—Rights of Parent.*—Under §3065 Burns 1914, §2518 R. S. 1881, the father, if living and a suitable person, is entitled to the custody of his infant children, but if he has abandoned them or is under disability, the mother, if she is a proper person, succeeds to the right of custody; but a grandparent, who has cared for a minor child and formed a great affection for it does not thereby become entitled to its custody as against a parent, unless a strong case is made against the parent. p. 254.
  8. INFANTS.—*Dependent and Neglected Children.—Abandonment.—Evidence.—Sufficiency.*—In a proceeding under §1642 *et seq.* Burns 1914, Acts 1907 p. 59, to have an infant declared a dependent or neglected child, a mother who left home because of the cruel treatment of an insane husband *held* not to have abandoned or deserted her child, she having left it in the care and custody of the husband's parents. p. 256.

From Howard Circuit Court; *William C. Overton*, Judge.

Action by the State of Indiana against Villa Kathryn Orr and others. From a judgment for the state, the defendants appeal. *Reversed.*

*Donald P. Strode* and *Barnabas C. Moon*, for appellants.

*Ele Stansbury*, Attorney-General, and *John B. Joyce*, for the state.

On August 24, 1918, one Julia Sumption, the probation officer of Howard county, filed in the circuit court an affidavit, which is the basis of this proceeding.

The following is the substance of her affidavit: "Villa Catherine Orr is a female child under 17 years of age; the father of said child is Harry B. Orr, who is domiciled and is a resident in Howard County; the mother of said child is Catherine A. Orr, who is domiciled and is a resident in Pittsburgh, Pa.; said child is a dependent and neglected child within the meaning of the statute in such cases made and provided, in that her environment is such as to warrant the state, in the interest of said child, in assuming her guardianship, and she should be made a public ward by order of said court."

On the same day said probation officer filed in said court her statement, denominated "report." This report discloses that said child was three years of age on March 2, 1918; that her health is good; that her father's name is Harry Blaine Orr and his address 1501 N. Kennedy street, Kokomo, Indiana; that her mother's name is Kathryn Ellen Orr, whose address is unknown. Said report continues:

"Kathryn Ellen Orr, the mother of Villa Kathryn, deserted her and took up her residence in another state about a year ago. The father, Harry Blaine Orr, also neglected her; and as the family has always made its home with the parents of Mr. Orr, the care of the children fell upon

them. Leroy S. Orr and Mary E. Orr, grandparents of Villa Kathryn, are anxious to adopt her; and since I find that she is a dependent and neglected child, and their home altogether satisfactory, I recommend that she be made a ward of the court of Howard County until adopted.”

On the same day, the child and her father being present in court, the mother being absent, the matter was submitted, and the court made the following record: “That the defendant was born March 1, 1915; that the environment of the defendant is such as to warrant the State of Indiana, in the interest of said defendant, in assuming her guardianship; and she is therefore made a public ward and a ward of the Juvenile Court; and it is ordered that the probation officer of this court place said child in the care and custody of Leroy Orr and Mary E. Orr, her grandparents, at 1501 N. Kennedy Street, Kokomo, Indiana, until the further order of the court.”

On September 24, 1918, the mother of said child appeared in court and moved to set aside the submission, which motion was sustained. The cause was immediately resubmitted and thereupon the court made the following record: “The court having heard the evidence and being well advised in the premises finds that the defendant is a dependent and neglected child and that her environments are such as to warrant the State in assuming her guardianship and she is hereby made a ward of the Juvenile Court. And it is ordered that the Probation Officer place said child in the care and custody of Leroy Orr and Mary E. Orr, her grandparents, who live at 1502 N. Kennedy Street, Kokomo, Indiana, until the further order of the court.”

The mother then filed a bond and took a term-time appeal, which she is prosecuting in the name of her child.

On October 19, 1918, presumably pursuant to §1635 Burns 1914, Acts 1907 p. 221, the trial court filed its special finding of facts. This document is voluminous and consists of fifteen consecutively numbered items. So much of the substance thereof as is essential to an understanding of our decision, is as follows: "Harry Orr and Kathryn Orr were intermarried in August, 1906, and are the parents of three children, of whom Villa Kathryn Orr is the youngest, she being three years of age. Leroy S. Orr and Mary Orr are the parents of Harry Orr. Continuously since their marriage and until August 15, 1917, the parents of these children made their home with his father, Leroy S. Orr. Shortly after the marriage of said Harry Orr and Kathryn Orr, he suffered a nervous breakdown. He spent some time in the West for his health and returned to the home of his parents, where his family had remained. About April 7, 1917, said Harry Orr was adjudged a person of unsound mind and was committed to the Central Hospital for the Insane at Indianapolis, Indiana, where he remained as an inmate until August 10, 1917, at which time he was paroled, not as cured, but as safe to be at large. When he was permitted to leave said hospital, he returned to the home of his parents where he continues to reside. All said children were born in the home of said Harry Orr's parents where they have lived until the present time. Said Harry Orr has not been able to furnish suitable support and maintenance for his wife and children, and his parents have furnished what he thus lacked, except that said Kath-



ryn Ellen Orr worked a few weeks and earned some money. Said Harry Orr and wife have no property. The grandparents at all times have treated their daughter-in-law and her children with uniform kindness, have helped to care for them at all times, and sometimes have cared for them entirely. A short time after the marriage of said Harry Orr and Kathryn Ellen Orr they commenced having disputes and quarrels and they continued to have them until their separation on August 15, 1918. As soon as said Harry Orr returned from said hospital he and his wife resumed their quarrels and she declared her intention of leaving. Just before August 15, 1917, she received a telegram that her mother at Pittsburgh, Pa., was sick. At her request said Leroy S. Orr furnished her the money to go to her mother. Her mother recovered in three or four weeks; but said Kathryn Ellen Orr sent for her clothes and since then has made her home with her said mother. Prior to leaving, said Kathryn Ellen Orr, knowing the physical and mental condition of her husband, did not make or try to make any arrangements for the care and support of her children, but left them with their said grandparents. She has not since contributed to their support except that she sent some Christmas presents to her husband for them and he returned the presents to her. Ever since June 15, 1917, Kathryn Ellen Orr has made her home with her mother and her brother at Pittsburgh, Pa., and is engaged in work there which takes her away from home every day. Her mother is sixty-three years of age and has no property. Her brother is thirty-five years of age, unmarried, and has no property except he may have a little money. Her mother and brother are willing to receive her

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children into their home. Before said Kathryn Ellen Orr left her husband she corresponded with other men and was guilty of unfaithfulness to him; and she is not a suitable person to have the care and custody of her said children. Ever since a short time after the marriage said Harry Orr has been and still is nervous, irritable, suspicious, and mentally and physically unsound. He is now able to work at times and at times he has bad spells, at which times he is unable to work and is hard to get along with, and has been unfaithful to his wife; and he is an unfit person to have the care and custody of his said children. A strong attachment exists between said children and their said grandparents. Said Leroy S. Orr and his wife do not have much property; but they have good health and are suitable and proper persons to have the care, custody and management of said children. All said children have been, and still are, dependent upon said grandparents for support. Their surroundings and the condition and conduct of their parents have been such as to warrant the Court in making them and each of them wards of the Court. The defendant Villa Kathryn Orr is a neglected and dependent child under 12 years of age. Said grandparents had these proceedings brought for the reason that said Kathryn Ellen Orr had threatened to take said children, and said grandparents desired to gain such legal control of said children as would enable them to keep said children together and raise, care for, and control them; and they have thought that they might adopt them as their own children."

DAUSMAN, J.—By §1642 Burns 1914, Acts 1907 p. 59, the legislature has defined a dependent child as fol-

lows: "The words 'dependent child' \* \* \*

1. shall mean any boy under the age of sixteen (16) years, or any girl under the age of seventeen (17) years, who is dependent upon the public for support, or who is destitute, homeless or abandoned."

There is no evidence tending to prove that Villa Kathryn Orr is a dependent child as defined by said statute. Indeed, the special finding of facts conclusively shows that she is not a dependent child. She has never been a charge upon the public. She has never been destitute, homeless, or abandoned. During her entire life she has been in the home of her grandfather, where all concerned lived together as a common family. In that home she has been sheltered, clothed and nourished, and (excepting the last year) has had what is generally regarded as the greatest blessing to a little child—a mother's care, and evidently the trial court is strongly of the opinion that the grandfather's home is the best place for her now. Under these circumstances, the action of that court in adjudging her to be a dependent child is wholly unwarranted.

By §1643 Burns 1914, *supra*, the legislature has defined a neglected child as follows: "The words 'neglected child' \* \* \* shall mean any boy under the age of sixteen (16) years or any girl under the age of seventeen (17) years, (1) who has not proper parental care or guardianship; (2) or who habitually begs or receives alms; (3) or who is found living in any house of ill-fame, or with any vicious or disreputable persons; (4) or who is employed in any saloon; (5) or whose home by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may

be, is an unfit place for such child; (6) or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship.”

With respect to clause 1 of this section of the statute, it might be contended that, since the father is insane and the mother away, the child is with-

2. out proper parental care. But that contention is excluded by the undisputed evidence and the facts found by the court. The child was left by the mother in the custody of its grandparents, who have so great affection for the little girl that they desire to keep her even to the exclusion of the mother, and the grandparents are suitable persons to be entrusted with the child's care. It is not unusual for grandparents to take into their home grandchildren whose parents have been rendered unable through misfortune to provide for them. When a grandfather takes his grandchild into his home and treats it as a member of his own family, the relation between them becomes akin to that of parent and child. He is said then to stand to the child in the relation of *loco parentis*, and the doctrine of *loco parentis* has long been known to the law. 20 R. C. L. 593. Under the circumstances of the case at bar, there can hardly be a difference of opinion on the proposition that the child does not come within clause 1 of the statute under consideration.

The uncontroverted evidence, together with the action of the trial court, precludes any contention that the child comes within clause 2, 3, 4, or 5, and there is not even a suggestion to that effect.

It will be observed that the first five clauses of said §1643, *supra*, are specific, but the last is general.

“Environment” is a word of broad significance. Just what the legislature intended by this last clause we do not know. We assume, however, that it did not intend thereby to confer unlimited authority on the courts to determine arbitrarily and generally what sort of environment will justify the state in assuming control of infants. It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens. To determine and declare the general policy of the state on this subject, is a legislative function which cannot be delegated to the courts.

The courts are frequently required to determine who shall have the custody of a child, as between adverse claimants thereto, in divorce and *habeas*

4. *corpus* cases, but such cases must be distinguished from cases arising under the statute now under consideration. Acts 1907 p. 59, *supra*. This act must not be confounded with the act of March 10, 1903, §1630 *et seq.* Burns 1914, or the act of March 6, 1905, amended in 1917. See Acts 1903 p. 516; Acts 1905 p. 440, §1641 *et seq.* Burns 1914; Acts 1917 p. 341. The act of March 10, 1903, relates exclusively to children of the class commonly known as juvenile offenders; the act of March 6, 1905, as amended in 1917, relates exclusively to children of the class commonly known as juvenile delinquents, and neither of said acts has any application whatever to the case at bar.

Evidently the three legislative enactments to which we have just referred have been confused by the trial court and by all others concerned in the prosecution of the case at bar. The cause is entitled “The State

of *Indiana v. Villa Cathryn Orr*.” The attorney who prosecuted the proceeding is designated in the bill of exceptions “Attorney for the State of Indiana” and “Counsel for the State,” and he has indorsed his approval on the bill. It does not appear by what authority the state was made a party to this proceeding, or by what authority said attorney appeared on behalf of the state, or by whom he was employed. Why was the three year old child made the defendant? Surely this baby is not a criminal, nor a juvenile offender, nor a delinquent child. If the proceeding be regarded as distinctively an action by the State of Indiana against the child, it is certainly unique. It appears from the record that the child was brought into court without the issuance of any writ, and the trial proceeded with no one to represent the helpless child defendant. The father was present at the first hearing, but everyone concerned knew him to be insane. The grandfather was present at that hearing, but he is the person who instigated the proceeding. A lawyer who knows the meaning and value of constitutional limitations should be quick to perceive the element of tyranny involved, and any man who has grown up under the protection of the federal and state Constitutions, and who is imbued with American ideas of civil liberty and endowed with a sense of fairness, even though he be not a lawyer, should intuitively know the danger of such unrestrained exercise of power.

Section 3 of the act applicable herein, Acts 1907 p. 59, *supra*, provides that: “The Judge of the Juvenile Court in any County shall hear every case brought by any person, or by the Board of Children’s Guardians, concerning a dependent child or a neg-

lected child.” Section 6 provides that: “Neither the Board of Children’s Guardians, nor any other person bringing the case of a dependent or a neglected child before the court under the provisions of this Act, shall be liable for the payment of any court costs.” These provisions of the statute indicate clearly that the legislature did not intend that the state should prosecute the proceeding.

The complaint was filed by one Julia Sumption, but it is clear that the grandfather is the real party in interest, and that the contest is between him

5. and the mother of the child. He is seeking to bring about a situation which in his opinion will enable him to adopt the child without notice to the mother, thereby avoiding any resistance which she might otherwise make to the adoption. But the relation of parent and child cannot be permanently severed without notice to the parent. See *Van Walters v. Board, etc.* (1892), 132 Ind. 567, 32 N. E. 568; *Wilkison v. Board, etc.* (1902), 158 Ind. 1, 62 N. E. 481. When the proceeding was instituted the mother was temporarily in Pennsylvania. Her address was known to the grandfather, and if not known to the “attorney for the state,” he could readily have obtained it. But no effort was made to notify her, and she knew nothing of the proceeding until two weeks after the first hearing, when she received a letter from a neighbor informing her what had been done with her child. Thereupon she returned, and is making an effort to protect her natural and legal right.

The complaint charges that the child is a dependent and neglected child in that her environment is such as to warrant the state, in the interest of the child, in assuming her guardianship, and, in order to

gain possession of the child, the trial court has done the only thing it could do with any hope of success, viz., adjudged the child to be “a dependent and neglected child” within the meaning of clause 6 of §1643, *supra*.

The action of the trial court is strangely contradictory. Evidently the trial court was of the opinion that the home in which the child was living

6. was “altogether satisfactory,” for he immediately recommitted the child to that home. If the trial court had found that the grandfather’s home was not a suitable place for the child, and that the child’s environment was bad because of the constant presence of its unfortunate, but insane, father, we could understand that the court was endeavoring to promote the welfare of the child. But, as the record stands, it is too clear for any difference of opinion that the controversy in reality is between the child’s grandfather and its mother. The law provides ways by which such controversies may be properly presented and determined, but the statutes under which the proceeding was ostensibly brought cannot be used for that purpose.

The grandparents are to be commended for their kindness in assisting their unfortunate son and his family, but their affection for the child cannot

7. be permitted to prevail as against the mother, unless a strong case be made against the mother. *Gilmore v. Kitson* (1905), 165 Ind. 402, 74 N. E. 1083; 12 R. C. L. 1105 *et seq.* The relation of parent and child is not created by the law of the state. It is a natural relation, and in all civilized countries it is regarded as sacred. Of the many ties that bind humanity, that which unites the parent and the child is the earliest and the most hallowed.



The policy of the state, as declared by the legislature, is that the father shall have the custody of his infant children if he be a suitable person. But if the father be not living, or if he has abandoned his children, or if he be under disability, or if he be an unfit person to have the custody of his infant children, then the mother succeeds to the right of custody if she be a suitable person. §3065 Burns 1914, §2518 R. S. 1881. In the case at bar the father is insane, and that fact entitles the mother to assert her claim to the custody of her child.

We are impelled by a sense of duty to say that a gross injustice has been done this mother. In item 8 of its special finding the court says that prior to leaving the home of her husband's parents she knew the physical and mental condition of her husband, and did not make, or try to make, any arrangements for the care and support of her children. The uncontroverted evidence shows that statement to be unwarranted. The mother is thirty-one years of age. Her husband told her that she could not remain in the family and that she would have to leave. She discussed the matter with his father, who thereupon gave her money to pay her transportation to Pittsburgh, and advised her to go. In the presence of his parents, her husband accused her of improper conduct with men, and also made that charge concerning her to the neighbors. He addressed her in profane and offensive language. He made unconscionable demands upon her. He arrived home from the insane asylum on Friday, and she went away on the following Wednesday. While absent she corresponded with her husband, and also exchanged letters with his mother at least every two weeks and sometimes every week.

Her mother-in-law wrote her to take a nice long visit and not hurry about coming home, and at the trial testified that in her judgment it was best that she remain away. While at Pittsburgh she lived with her mother and brother. Her mother is sixty-three years of age. Her brother is thirty-five years of age, unmarried, and a reporter for a newspaper. When her mother recovered from her sickness, she obtained employment in a dry goods store, where she has worked continuously since. At Christmas time she sent clothing to the children, which her husband returned. Some time in the following June she returned to Kokomo to visit her children, and remained about two weeks, during which time she went occasionally to the Orr home, but stayed most of the time with the neighbors. When she was about to return to Pittsburgh she desired to take the children with her to her mother's home, but Grandfather Orr said "No. You can't have them. I have had legal advice on that matter." He further testified: "I was vexed with her because she threatened to take the children away; and she knew I was attached to them. We were in constant fear that she would take the children away from us."

Under such circumstances it cannot be said that the mother abandoned or deserted her children, or that she made no effort to provide a place for

8. them. Neither can it be said that she deserted her husband. His disposition and propensities are such that no intelligent and conscientious woman could live with him as a wife without completely sacrificing her sense of duty and propriety. The continued submission by a woman of normal sensibilities to the abnormal demands of an insane husband would destroy the last vestige of her self-respect and extin-

guish every humane quality. We are of the opinion that her course was the wise one to pursue.

In the tenth item of the finding the trial court makes the statement that the mother of this child, before she left her husband, corresponded with men other than her husband, and was guilty of unfaithfulness to him. This statement is very obscure, and is subject to various interpretations, but it is evident that the trial court intended it to be construed in a way detrimental to her. The fragment of a letter which had been partly burned was introduced in evidence. This fragment does not bear the name of any person, and so much of the document has been destroyed that no rational mind can legitimately draw the conclusion therefrom that she corresponded promiscuously with "other men." From the evidence in the record on this point it is impossible for any fair-minded person to draw any inference inconsistent with the presumption of her innocence. If by "unfaithfulness" the trial court intended to insinuate that she was guilty of adultery, that insinuation is utterly groundless. Several neighbors testified to her good character, and their testimony was not questioned. We cannot permit these findings to stand. The good name of a mother is precious not only to herself, but also to her children, and if it is to be smirched by a court record, that record must rest on something substantial.

The proceedings herein have been very irregular, but no one has questioned the right of the mother to prosecute this appeal. There is no evidence to support the action of the court in adjudging Villa Kathryn Orr to be a dependent or a neglected child.

Judgment reversed.

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Peale v. Town of Arcadia—70 Ind. App. 258.

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## PEALE v. TOWN OF ARCADIA ET AL.

[No. 10,370. Filed May 28, 1918.]

COURTS.—*Jurisdiction.—Transfer of Cause from Supreme to Appellate Court.—Effect.—Validity of Ordinance.*—Where plaintiff sued a town and its board of trustees to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within limits including plaintiff's yard, on the ground that the ordinance was invalid and void, and that the board had no authority to pass it, and, on judgment being rendered for defendants, plaintiff appealed to the Supreme Court where he attempted to raise the question of the validity of the ordinance. that court's transfer of the cause to the Appellate Court for want of jurisdiction was equivalent to a finding that the power of the board to enact the ordinance must be regarded as settled, and such question could not be considered on appeal.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Joseph Peale against the Town of Arcadia and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Ralph H. Waltz, Floyd G. Christian and Ira W. Christian*, for appellant.

*J. F. Neal and N. C. Neal*, for appellees.

McMAHAN, J.—The appellant commenced this action against the town of Arcadia and the members of the board of trustees of said town to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within certain prescribed limits.

The complaint alleges that the board of trustees of said town passed an ordinance on September 28, 1916, making it unlawful to maintain or operate a junkyard within certain described limits; that appellant has

been a resident of said town for more than five years, and that during all of said time he has operated and maintained a junkyard within the corporate limits of said town and within the territory described in said ordinance; and that the appellees were threatening to prosecute appellant for violating said ordinance. It is alleged that the said ordinance is invalid and void; that the board of trustees of the said town had no legal authority to pass the same, and asking that appellees be enjoined from enforcing it.

The cause was tried by the court, and resulted in a finding and judgment for the appellees. Appellant filed a motion for a new trial, assigning as reasons that the finding of the court is (1) contrary to law, and (2) not sustained by sufficient evidence.

The only error assigned is the overruling of the motion for a new trial. This appeal was taken to the Supreme Court, where the appellant attempted to raise the question of the validity of said ordinance by claiming that the board of trustees had no power to pass the same. The Supreme Court transferred the cause to this court for want of jurisdiction, which is equivalent to saying that the power and authority of the appellees to enact the ordinance in question must be regarded as settled in this state and cannot be considered in this appeal. *Pittsburgh, etc., R. Co. v. Rogers* (1907), 168 Ind. 483, 81 N. E. 212.

The validity of the ordinance being established, we know of no reason why the appellees should be enjoined from enforcing it. The appellant, both in his complaint and as a witness, admitted that he was maintaining and operating a junkyard in violation of the ordinance. There was no error in overruling the motion for a new trial.

Judgment affirmed.

## PEALE V. TOWN OF ARCADIA ET AL.

[No. 10,370. Filed May 28, 1918.]

COURTS.—*Jurisdiction.—Transfer of Cause from Supreme to Appellate Court.—Effect.—Validity of Ordinance.*—Where plaintiff sued a town and its board of trustees to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within limits including plaintiff's yard, on the ground that the ordinance was invalid and void, and that the board had no authority to pass it, and, on judgment being rendered for defendants, plaintiff appealed to the Supreme Court where he attempted to raise the question of the validity of the ordinance. that court's transfer of the cause to the Appellate Court for want of jurisdiction was equivalent to a finding that the power of the board to enact the ordinance must be regarded as settled, and such question could not be considered on appeal.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Joseph Peale against the Town of Arcadia and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Ralph H. Waltz, Floyd G. Christian and Ira W. Christian*, for appellant.

*J. F. Neal and N. C. Neal*, for appellees.

McMAHAN, J.—The appellant commenced this action against the town of Arcadia and the members of the board of trustees of said town to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within certain prescribed limits.

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The validity of the ordinance being established, we know of no reason why the appellees should be enjoined from enforcing it. The appellant, both in his complaint and as a witness, admitted that he was maintaining and operating a junkyard in violation of the ordinance. There was no error in overruling the motion for a new trial.

Judgment affirmed.

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Haupt v. Schmidt—70 Ind. App. 260.

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## HAUPT v. SCHMIDT ET AL.

[No. 10,378. Filed March 4, 1919. Rehearing denied May 28, 1919.]

1. **EQUITY.**—*Right to Relief.—Injury to Property.—Inadequacy of Legal Remedy.*—The office of equity is not to supplant, but to supplement, the law, and whenever a party has a clear legal right, in matters of property, and no adequate remedy at law, he is entitled to the aid of a court of equity. p. 262.
2. **INJUNCTION.**—*Office of.—Protection of Property.*—Broadly stated, the office of an injunction is to protect property, and rights of property. p. 262.
3. **OFFICERS.**—*School Trustee.—Interference with Assumption of Office.—Right to Injunctive Relief.*—One elected to the office of school trustee is not entitled to an injunction against members of the board restraining them from preventing him from assuming the duties of his office, since the right to hold office is not a property right cognizable in a court of equity, but merely a political right not coming within the jurisdiction of a court of chancery. p. 263.

From Sullivan Circuit Court; *W. H. Bridwell*, Judge.

Action by Charles A. Haupt against Henry F. Schmidt and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Frank S. Rawley, George O. Dix, McNutt, Wallace & Randel* and *Hays & Hays*, for appellant.

*Davis, Moore, Cooper, Royse & Bogart, Harris & Bedwell* and *Daniel V. Miller*, for appellees.

ENLOE, J.—The appellant brought this action, by filing his verified complaint in the superior court of Vigo county, on January 4, 1918, seeking an injunction against the appellees to restrain them from interfering with him in the matter of taking and assuming the duties of his office as one of the school trustees of the city of Terre Haute, which said office he alleged



he was entitled to take and assume the duties thereof on January 7, 1918.

The complaint alleged that appellant, at the election held in November, 1917, was duly elected as such trustee; had received his certificate of election from the proper officers; had duly qualified as such officer elect, and was legally qualified as a citizen and resident to fill such office, and was thereby entitled to take and assume the duties of his said office on the first Monday of January, 1918. The complaint also alleged that certain members of the board of school trustees of said city had conspired together to wrongfully and unlawfully prevent him from assuming the duties of his office, to which he had been elected, and would, unless restrained, prevent him from assuming such office and duties.

By a supplemental complaint filed herein, it was alleged that the appellees had carried out their illegal purpose, and had denied to appellant his right to sit as a member of said board of school trustees, and were keeping him wrongfully out of the office, and from assuming and performing the duties thereof, to which he had been duly elected.

The venue of the case was changed to the Sullivan Circuit Court, and a demurrer, for want of facts, was then filed and sustained to appellant's complaint. Appellant refusing to further plead, judgment was rendered against appellant in said cause, and in favor of the appellee for the costs.

The errors assigned challenge the rulings on the demurrer to the complaint, and also the action of the court in dissolving the temporary injunction.

The first and important question in this case is one of jurisdiction. Is this such a case as is cognizable in a court of equity?

The office of equity is to supplement, not supplant, the law. Whenever a party has a clear legal

1. right, in matters of property, and no adequate remedy at law, he is entitled to the aid of a court of equity.

Generally stated, the office of an injunction is to protect property, and rights of property. *In re Sawyer* (1888), 124 U. S. 200, 8 Sup. St. 482, 31

2. L. Ed. 402; *State, ex rel. v. Aloe* (1899), 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Muhler v. Hedekin* (1889), 119 Ind. 481, 20 N. E. 700; *Smith v. Myers* (1887), 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *People v. Barrett* (1903), 203 Ill. 99, 67 N. E. 742, 96 Am. St. 296; *Marshall v. Illinois State Reformatory* (1903), 201 Ill. 9, 66 N. E. 314. In the case last cited the court said: "It is elementary that the subject-matter of all chancery jurisdiction is property and the maintenance of civil rights, and that matters of a political character do not come within its jurisdiction."

In the *Barrett* case, *supra*, the court quoted with approval the foregoing statement, and said, referring to the matter then before the court: "These matters involve, in themselves, no property rights, but pertain solely to the political branch of the government and cannot be controlled by a court of chancery."

A political right is defined to be "A right exercisable in the administration of government"; while a civil right is said to be "A right accorded to every member of a distinct community or nation." *Anderson*, Law Dictionary 905. *Bouvier* says: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government." "Civil rights are those which have no

relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like.” 3 Bouvier, Law Dictionary (Rawle’s 3d ed.) 2962. It is true that we find cases where a court of equity has given injunctive relief in cases where political rights were involved, but it is also true that in each and all of such cases, so far as we have been able to find, the basis upon which the relief was granted was the protection of some property right, as in the case of *Chicago Macaroni Mfg. Co. v. Boggiano* (1903), 202 Ill. 312, 67 N. E. 17. In this last case the plaintiff asked for an accounting, a matter cognizable in a court of equity, and the court, acting upon the maxim that, where a court of equity rightfully assumes jurisdiction of a matter, it will draw unto itself all other matters connected therewith in dispute between the parties, that full and complete justice may be done, gave injunctive relief against one who was assuming to act as an officer of said corporation, and as such was collecting and disbursing the funds of said corporation.

In the case at bar, the question was purely governmental, political. No question of property is involved.

The right to hold an office and perform the duties thereof is not a property right. A public office is not property, but a mere public agency created for the benefit of the state.

It therefore follows that the demurrer to the complaint was rightfully sustained, and the judgment of the Sullivan Circuit Court is therefore affirmed.

## WARNER GEAR COMPANY v. DEPEUGH.

[No. 9,828. Filed May 28, 1919.]

1. EVIDENCE.—*Admissions.—Declaration Against Interest.—Admissibility.*—In an action for personal injuries, plaintiff's statement, "it was all my fault," made shortly after the accident resulting in the injuries complained of, was competent as an admission against interest. p. 265.
2. EVIDENCE.—*Admissions.—Weight and Effect.—Questions for Jury.*—Admissions when proved to have been made are to be considered and weighed the same as other evidence, and the effect of the circumstances under which the admissions were made is to be determined by the jury. p. 265.
3. APPEAL.—*Review.—Instructions.—Invading Province of Jury.—Reversal.*—On a servant's action for personal injuries brought under the Employers' Liability Act (Acts 1911 p. 145, §8020a et seq. Burns 1914), an instruction that plaintiff's statement, "it was all my fault," made shortly after the accident, was only a conclusion not amounting to an admission of negligence, was erroneous as invading the province of the jury, and such error warrants a reversal where the court on appeal cannot say that a correct result was reached at the trial. p. 266.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Action by George DePeugh against the Warner Gear Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Taylor, Carter & Wright*, for appellant.

*Edward R. Templer* and *Wilbur Ryman*, for appellee.

REMY, J.—On August 20, 1915, while appellee was in the employ of appellant company in the enameling department of its factory, he received certain personal injuries, and later commenced this action for damages, charging that his injuries were the result

of appellant's negligence. The action is brought under the Employers' Liability Act of 1911. Acts 1911 p. 145, §8020a *et seq.* Burns 1914. Upon the issues presented by appellee's second paragraph of complaint and appellant's answer in denial thereto, the cause was submitted to the court and jury, resulting in a verdict for appellee. The overruling of the motion for a new trial is the only error assigned.

The motion for a new trial contains numerous specifications, but, in our view of the case, it is only necessary to consider that relating to the action of the court in giving to the jury on its motion instruction No. 22, which is as follows: "Some evidence has been introduced before you of alleged admissions of the plaintiff wherein it is claimed that the plaintiff, speaking of his alleged injuries, and as to how the injury occurred, said, among other things, that it was all his fault. The court instructs you that if you believe from the evidence that the plaintiff made use of some expression that 'it was all my fault,' such expression was only a conclusion of the plaintiff and not the statement of a fact and would not amount to an admission of negligence."

Some witnesses had testified that shortly after the accident which resulted in the injuries complained of appellee stated, "it was all my fault." This

1. admission or declaration being against interest, and being related to a matter material to the issue, was admissible in evidence. *Peterson v. Silver Peak Min. Co.* (1914), 37 Nev. 117, 140 Pac. 519, and cases cited. Admissions, when proved to have been made, are to be considered and weighed precisely as other evidence. The weight of such evidence depends upon its character and the cir-

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cumstances under which the admissions were made, and the effect of such circumstances is to be determined by the jury. 17 Cyc 814. See also *Finch v. Bergins* (1883), 89 Ind. 360; *Newman v. Hazelrigg* (1884), 96 Ind. 73; *Kauffman v. Maier* (1892), 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124. By the instruction

complained of the jury were told that the statement, if made by appellee, would not under any circumstances amount to an admission of negligence. This was clearly an invasion of the province of the jury; and, in view of the fact that, as shown by the record, there were irregularities in the trial of the cause which may have prejudiced the rights of appellant, and since there was a sharp conflict in the evidence, we cannot say that the correct result was reached, and that the error in the giving of the instruction was harmless.

Appellant has presented other questions for our consideration; but, inasmuch as they involve matters not likely to arise in another trial of the cause, we do not deem it necessary to consider them in this opinion. Judgment reversed, with instructions to grant a new trial.

Nichols, J., not participating.

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FEDERAL LIFE INSURANCE COMPANY v. MAXAM ET AL.

[No. 9,327. Filed November 22, 1917. Rehearing denied February 26, 1918. Transfer denied May 28, 1919.]

1. TRIAL.—*Conclusions of Law.*—*Exceptions.*—*Effect.*—By excepting to the conclusions of law appellant concedes, for the purposes of the exception, that the facts within the issues are fully and correctly found. p. 277.

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2. **INSURANCE.—Life Insurance.—Reinsurance Contract.—Imposing Conditions on Policyholders.**—A life insurance company which contracted with another company to reinsure the latter's policyholders had no legal right to charge liens against a policy in the other company, or to increase the holder's annual premium, and such policyholder had the right to stand on his contract for insurance as evidenced by his original policy. p. 277.
3. **INSURANCE.—Life Insurance.—Reinsurance.—Breach of Policy Conditions.—Rights of Policyholder.**—Where a life insurance company entered into a contract under which it acquired the assets of another company and agreed to reinsure its policyholders, but refused to carry out a policy or to continue the insurance in force unless the holder of such policy ratified illegal liens charged against it and paid an increased amount of premium wrongfully demanded of him, such action was a breach of the reinsurance contract and a repudiation of the policy giving the holder the right to elect the remedy invoked by him of treating the contract as breached and suing to recover the damages sustained by him on account thereof. p. 278.
4. **CONTRACTS.—Executory.—Breach.—Remedies.**—Where one party to an executory contract repudiates it and refuses longer to be bound, the injured party has the right to elect either to treat the contract as rescinded and recover upon the *quantum meruit* as far as he has performed, where the contract is of such a nature that there may be a recovery for part performance, or to keep the contract alive for the benefit of both parties, keeping himself at all times ready, willing and able to perform, and, at the time fixed by the contract for performance, sue and recover according to the terms of the contract on the theory that he has fully performed and discharged all the duties and obligations imposed upon him, except as prevented by the other party, or to treat the breach or repudiation as putting an end to the contract for all purposes of performance, and to sue at once to recover the damages occasioned by such repudiation, in which case the injured party is not bound to give further notice to the defaulting party of his election before bringing suit, nor to show, as a condition precedent to recovery, that he has been at all times ready, willing and able to perform after the time when the other party repudiated the contract. p. 278.
5. **ELECTION OF REMEDIES.—Breach of Contract.—Action.—Notice.**—The bringing of an action, or taking legal steps to enforce a contract, amounts to an election by the party not to rescind on account of anything known to him, and where a party institutes a suit for damages for the breach of an executory contract, his

action is notice to the other party of his election<sup>6</sup> to treat the contract as breached and at an end, except for the purpose of ascertaining the resulting damages, and such election is conclusive against the party making it. p. 284.

6. APPEAL.—*Review.*—*Ruling on Demurrer.*—*Failure to Specify Defects.*—*Waiver.*—Any error based on defects in a complaint which are not specified in the memorandum accompanying the demurrer is waived. p. 285.
7. APPEAL.—*Assignments of Error.*—*Causes for New Trial.*—Attempted assignments of error which, if proper at all, deal with matters that should be assigned as grounds for a new trial, present no questions on appeal. p. 286.
8. NEW TRIAL.—*Grounds.*—Under the statute (§585 Burns 1914, §559 R. S. 1881), assignments that “the decision and judgment of the court are not sustained by sufficient evidence” and “because the decision and judgment of the court are contrary to law,” are unauthorized and cannot be recognized as grounds for a new trial. p. 286.
9. NEW TRIAL.—*Grounds.*—*Excessive Damages.*—*Statute.*—*Applicability.*—*Torts.*—Section 585, subd. 4, Burns 1914, §559 R. S. 1881, authorizing the granting of a new trial for excessive damages, applies only in cases of torts. p. 286.
10. ACTION.—*Ex Contractu.*—*Ex Delicto.*—In a suit for damages for the breach of a contract, the action arises out of the agreement of the parties, and is generally denominated an action *ex contractu*, but the right of action for a tort arises out of a breach of duty fixed by law, independent of the will or agreement of the parties, and is usually denominated an action *ex delicto*. p. 287.
11. NEW TRIAL.—*Grounds.*—*Excessive Damages.*—*Breach of Contract.*—Section 585, subd. 5, Burns 1914, §559 R. S. 1881, authorizing a new trial for excessive recovery where the action is upon contract, was properly followed by defendant, in an action for breach of an insurance contract, in seeking a new trial on the ground that the amount of recovery was erroneous in that it was too large. p. 287.
12. APPEAL.—*Review.*—*Merit Fairly Tried.*—*Affirmance.*—Where it appears that the case was fairly tried and a correct result reached, and that appellant was deprived of no substantial right, the judgment will be affirmed. p. 288.
13. NEW TRIAL.—*Grounds.*—*Sufficiency.*—An assignment as ground for new trial that certain enumerated special findings “are not nor are either of them sustained by sufficient evidence” is unauthorized by statute (§585 Burns 1914, §559 R. S. 1881), and insufficient. p. 289.



From Posey Circuit Court; *Herdis Clements*, Judge.

Action by Sylvester A. Maxam against the Federal Life Insurance Company and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

*C. A. Atkinson, Sanford Trippett and Larz A. Whitcomb*, for appellant.

*J. Morton McDonald*, for appellees.

FELT, J.—This is a suit by Sylvester A. Maxam against Federal Life Insurance Company and Mary A. Maxam, for the damages alleged to have been sustained by Sylvester A. Maxam, hereinafter referred to as appellee, because of the wrongful cancellation or lapsing of a policy of life insurance issued upon his life in the sum of \$2,500, payable to his wife, Mary A. Maxam, who filed an answer showing an assignment and transfer to appellee of whatever interest she had in the policy, or rights growing out of its cancellation.

The complaint was in one paragraph to which an answer in three paragraphs was filed by the insurance company. The first was a general denial, the second a plea of the six-years' statute of limitations, and the third set up matter in bar of the action. A demurrer for insufficiency of facts was sustained to the third paragraph.

The case was tried by the court and upon due request the facts were found specially on which the court stated its conclusions of law which were in favor of appellee.

Appellant's motion for a new trial was overruled, and judgment rendered on the conclusions of law for

\$1,035.74 and costs. From this judgment appellant appealed and has assigned numerous alleged errors, including an assignment that the court erred in overruling the demurrer to the complaint, sustaining the demurrer to the third paragraph of answer, and in each conclusion of law.

Appellee contends that neither the complaint copied into the transcript, nor the memoranda accompanying the demurrer, is sufficiently identified by the record to enable the court to consider and pass upon any questions depending upon a consideration of these instruments.

The identification is not free from doubt, but the court is warranted in treating the instruments copied into the transcript as the pleadings on which the case was tried, and, inasmuch as practically the same questions arise on the exceptions to the conclusions of law as are attempted to be presented in relation to the complaint and answer, we believe the substantial rights of the parties may be determined by considering the questions raised by the exceptions to the conclusions of law and the assignments of errors based thereon. *Bright Nat. Bank v. Hartman* (1916), 61 Ind. App. 440, 109 N. E. 846, and cases cited; *Evansville Furn. Co. v. Freeman* (1915), 57 Ind. App. 576, 581, 105 N. E. 258, 107 N. E. 27; *Judy v. Jester* (1913), 53 Ind. App. 74, 84, 100 N. E. 15.

The finding of facts states in substance that appellant is a corporation organized under the laws of the State of Illinois and authorized to transact the business of life insurance on the legal reserve plan; that the Model Life Insurance Company is a corporation organized under the act of March 9, 1897, Acts 1897 p. 318, §4739 Burns 1914, passed by the general as-

sembly of Indiana; that on April 21, 1900, the Model Life Insurance Company, hereinafter denominated the Model, issued to appellee a life insurance policy for \$2,500, payable to his wife Mary A. Maxam, which called for an annual premium of \$58.82, and likewise at the same time issued to him a co-operative certificate by the terms of which, in consideration of the rendition of certain services, he was to receive a stipulated compensation to be credited upon his annual premium; that on March 12, 1904, appellant and the Model entered into a certain written contract, pursuant to §15 of the act of March 9, 1897, Acts 1897 p. 318, §4753 Burns 1914, by which appellant acquired all the assets of the Model and undertook to reinsure all the policyholders of the Model, including appellee; that no written or printed notice was mailed to appellee at least thirty days before the day fixed for the meeting of the insured called to consider the contract of transfer or reinsurance aforesaid, and appellee had no notice or knowledge of such meeting prior thereto; that by the terms of the contract between said companies an attempt was made to authorize appellant to charge up as a lien against each of the policies held by the Model "an amount equal to the terminal reserve which should have accumulated to the credit of the respective policies" with stipulated interest charges thereon, and the right to charge against each of such policies an additional reserve lien annually from and after the date of such contract amounting to the difference between the premium theretofore paid annually by any of such policyholders and the annual premium rate of appellant for a like policy to the age of entry of such policyholder, to bear five per cent. per annum from the day so charged until paid;

that the provisions of such contract and those of the policy issued by the Model to appellee relating to the premiums to be paid are different and wholly inconsistent; that appellee was wholly ignorant of the provisions of the aforesaid contract between said companies, and did not become aware of them until about April 1, 1910; that on March 12, 1904, appellant issued to appellee a certain policy of reinsurance as follows: (The provisions of this instrument are identical with those of the one set out in *Federal Life Ins. Co. v. Kerr* [1910], 173 Ind. 613, 615, 616, 89 N. E. 398, 91 N. E. 230, and will not be repeated here.)

That appellant did not inform appellee of the provisions of said reinsurance contract in reference to liens until about April 1, 1910; that appellee made no inquiry of appellant, and did not attempt to ascertain the terms and conditions of the contract between said companies, but could have obtained full information in regard thereto had he made request therefor; that when appellant issued to appellee the aforesaid reinsurance policy for the purpose of inducing him to accept and retain the same and continue to pay premiums thereon, it represented to appellee, with intent to have him rely thereon, that appellant had reinsured and assumed the policies of the Model, including that of appellee, subject to the terms of the aforesaid contract, and that in accordance therewith it would continue appellee's policy in force by his "paying to it the premiums as and when required by the terms of said Model policy"; that appellee relied upon the aforesaid representations as true, and did not know the aforesaid contract purported to authorize the charging of the aforesaid liens against his policy; that he relied on the statements and representations

aforesaid, and in pursuance thereof annually paid to appellant on or before the 21st day of April of each year the sum of \$58.82, which was the full amount of premium due on the policy issued him by the Model; that appellant accepted the same and still retains the amount so paid; that appellant continually from the issuance of said reinsurance contract up to April 1, 1910, stated and represented to appellee and led him to believe that the full amount of annual premium due from him on said policy was \$58.82; that on or about April 1, 1910, appellant notified appellee that the amount of his annual premium on said policy was \$80.50 instead of \$58.82, and that the same would be due on April 21, 1910; that on March 12, 1904, appellant, without appellee's knowledge or consent, charged against his policy a reserve lien of \$151.30, and has annually charged against the same five per cent. interest, and has also in like manner annually charged against said policy a lien of \$21.68 and five per cent. interest thereon; that when appellee was, on or about April 1, 1910, notified that his premium was \$80.50, he requested an explanation, and was informed for the first time that appellant claimed to hold a lien against his policy in the sum of \$357.20 which would have to be paid or would be deducted, with five per cent. interest per annum from his policy at maturity, and that to keep the policy alive he must pay \$80.50 annually; that thereupon appellee refused to pay any further premiums on said policy and elected to treat the same as breached; that appellant insisted on its right to so charge and hold said liens against his policy, and refused to continue the same in force unless he recognized the existence and validity of said liens and would pay the increased premium

of \$80.50, and thereupon appellant declared the aforesaid policy of appellee lapsed by reason of the failure and refusal of appellee to pay said increased premium on or before April 21, 1910; that appellee was at that time fifty years of age and in good health; that at that time the usual and ordinary rate of annual premiums charged by reputable life insurance companies doing business in the State of Indiana "for a whole life participating policy of life insurance like the one held by appellee in the Model," at age fifty was from \$113.63 to \$121.23; that at that time appellee's life expectancy was twenty-one years; that appellee has done and performed all the things required of him by his policy of insurance, the co-operative certificate, and by the policy of reinsurance issued to him by appellant; that neither of the policies aforesaid issued to him had any cash surrender value in April, 1910; that Mary A. Maxam, before the commencement of this suit, assigned to appellee, in writing, all her right and interest in, to and under the aforesaid policies issued to appellee; that appellant "has breached and broken the policy of insurance and policy of reinsurance aforesaid, and appellee has been damaged thereby in the sum of \$1,035.74.

On the foregoing finding of facts the court stated conclusions of law, in substance, as follows: (1) That the acts of appellant in charging the aforesaid liens against appellee's contract of insurance was a wrongful and unlawful violation of appellee's rights, and an unwarranted breach of the policy of reinsurance issued to appellee. (2) That the act of appellee in increasing the annual premium on appellee's policy from \$58.82 to \$80.50 was wrongful and an unlawful violation of the reinsurance policy issued to appellee.

(3) That the rights of the parties under the policy of reinsurance issued to appellee were fixed and measured by the terms of the original policy issued appellee by the Model Life Insurance Company, and were not changed by any contract between the said company and appellant, to which appellee did not assent or which he did not ratify. (4) That the act of appellant in lapsing appellee's policy for failure or refusal to pay the premium of \$80.50 demanded thereon, on or before April 21, 1910, or within thirty days thereafter, was wrongful and an unlawful violation of appellee's rights under the policy of reinsurance issued to him, and was a breach of his contract of insurance. (5) That Mary A. Maxam has no right, title, or interest in the aforesaid policy. (6) That appellee is entitled to recover from appellant \$1,035.74.

The contract between the two insurance companies, the reinsurance policies or contract issued to policyholders of the Model Life Insurance Company, and the rights of the persons holding policies issued by that company and outstanding when appellant took over the business of the Model, have been considered by the Supreme Court and by this court in several cases, and many of the questions involved in this appeal are fully settled by the decisions in those cases. *Federal Life Ins. Co. v. Kerr*, *supra*; *Federal Life Ins. Co. v. Arnold* (1910), 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; *Federal Life Ins. Co. v. Risinger* (1910), 46 Ind. App. 146, 91 N. E. 533; *Federal Life Ins. Co. v. Petty* (1912), 177 Ind. 256, 97 N. E. 1011; *Federal Life Ins. Co. v. Lillibridge* (1912), 51 Ind. App. 704, 98 N. E. 1015.

Among the propositions determined by the forego-

ing decisions which are applicable to the case at bar are the following: (1) The instruments involved are to be liberally construed in behalf of the insured, so as to effectuate the evident intention of providing and securing indemnity. Doubts are to be solved in favor of the insured, and equivocal or doubtful provisions will be strictly construed against the insurance company on the theory that such contracts are carefully prepared by such companies and the parties do not stand upon the same level as to the meaning and interpretation of such instruments. (2) The statute (§4753 Burns 1914, §15, Acts 1897 p. 318) which authorizes the reinsurance contract involved in this suit will be considered as entering into and forming a part of such contract. (3) That appellant's liability to the holder of a policy in the Model Life Insurance Company, reinsured by it, is fixed and measured by the policy originally issued to and held by such person at the time the reinsurance contract was entered into, and such insurance companies cannot by contract between themselves minimize or change such insurance, or increase the cost thereof to the insured, or charge up against his policy any sum or amount, or create any lien against the same, unless authorized by the policy of insurance issued by the Model Life Insurance Company and held by the insured at such time. (4) The statute only authorized the reinsurance of the risks evidenced by the original policies issued by the Model Life Insurance Company and outstanding at the time the reinsurance contract was executed, and the rights of the holders of such policies as they existed at such time were not cut down or changed by the provisions of the aforesaid contract between the companies. (5) The



provisions of the reinsurance contract which are in antagonism with the rights of the insured, as fixed by the policy of the Model Life Insurance Company, are void as to the holder of such policies.

By excepting to the conclusions of law appel-

1. lant concedes for the purposes of such exception that the facts within the issues are fully and correctly found.

Appellant contends that the facts found fail to show such a breach of the contract of insurance as warranted appellee in instituting a suit for damages for its breach or repudiation; that before instituting such suit appellee was required by the law to notify appellant of his election to treat the contract as breached and at an end, except for the purpose of maintaining an action for damages for such breach; that a prerequisite to the maintenance of such suit is the establishment of the fact that appellee was able, ready and willing to carry out his part of the contract and the court has wholly failed to find such fact, which under the issues is a finding against appellee upon the issuable fact of his ability and willingness to pay the premium due under his contract.

Under the decisions rendered by the Supreme Court and by this court, involving the identical rein-

2. surance contract and similar policies, appellant had no legal right to charge liens against appellee's policy or to increase his annual premium.

The finding of facts also shows that after appellee was apprised of the increase of his premium and required to pay the same, in response to his inquiry for an explanation, he was informed by appellant that his policy would not be continued in force unless he recognized and acknowledged the existence and validity of

such liens and charges against his policy and paid the increased premium demanded of him; that he refused to acknowledge the validity of such liens and to pay the increased assessment, whereupon thereafter, and before the bringing of this suit, appellant declared appellee's policy lapsed by reason of his failure and refusal to pay such increased premium.

Appellee had the right to stand on his contract for insurance as evidenced by his original policy.

Appellant wrongfully, in violation of its obligation to carry out such contract as it existed when the reinsurance contract was entered into, refused

3. so to do, or to continue the insurance in force unless appellee ratified the illegal liens charged against his policy and paid the increased amount of premium wrongfully demanded of him. Such action on the part of appellant was a breach of the reinsurance contract entered into by it and a repudiation of the policy held by appellee which appellant was bound to honor. Such breach and repudiation gave appellee the right to elect the remedy invoked by him of treating the contract as breached and suing to recover the damages sustained by him on account thereof.

Where one party to an executory contract repudiates it and refuses longer to be bound by it, the injured party has the right to elect to pursue

4. either of several remedies: (1) Where the contract is of such a nature that there may be a recovery for part performance, the injured party may treat the contract as rescinded and recover upon the *quantum meruit* as far as he has performed. (2) He may keep the contract alive for the benefit of both parties, being and keeping himself at all times ready, willing and able to perform his part of the contract,

and at the time fixed by the contract for performance, sue and recover according to the terms of the contract on the theory that he has fully performed and discharged all the duties and obligations imposed upon him by the contract, or has done so except as prevented by the other party. (3) Or he may treat the breach or repudiation as putting an end to the contract for all purposes of performance, and sue at once to recover the damages occasioned by such repudiation or wrongful refusal to carry out the contract according to its terms.

In the latter instance the injured party is not bound to give further notice to the defaulting party of such election before bringing suit, and is not bound to show as a condition precedent to a recovery that he had been at all times ready, willing and able to perform his part of the contract, after the time at which the other party repudiated the contract. If he was not in default at the time of such repudiation, and was adhering to and honoring the contract when repudiated by the other contracting party, he has discharged the obligations imposed upon him, and upon his election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are fixed and the contract is at an end except for the purposes it may serve in such suit for damages for its breach. *Anvil Mining Co. v. Humble* (1894), 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Roehm v. Horst* (1900), 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 957; *Lake Shore, etc., R. Co. v. Richards* (1894), 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, and notes; *Bond v. Carpenter* (1887), 15 B. I. 440, 441, 8 Atl. 539; *People, etc. v. Empire, etc., Ins. Co.* (1883), 92 N. Y. 105; *Mutual Reserve, etc.,*

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*Assn. v. Taylor* (1901), 99 Va. 208, 37 S. E. 854; *Fort v. Iowa Legion, etc.* (1910), 146 Iowa 183, 123 N. W. 224; *Supreme Council, etc. v. Black* (1903), 123 Fed. 650, 59 C. C. A. 414; *O'Neill v. Supreme Council, etc.* (1904), 70 N. J. Law 410, 57 Atl. 463, 1 Ann. Cas. 422; *Strause v. Insurance Co.* (1900), 126 N. C. 223, 35 S. E. 471, 54 L. R. A. 605; *Indiana Life Endowment Co. v. Carnithan* (1916), 62 Ind. App. 566, 109 N. E. 851, 854, and cases cited; *Phoenix, etc., Ins. Co. v. Hinesley* (1881), 75 Ind. 1, 12; *Willcuts v. Northwestern, etc., Ins. Co.* (1882), 81 Ind. 300, 312; *Wagner v. Supreme Lodge, etc.* (1917), 64 Ind. App. 510, 116 N. E. 91, 96, and cases cited.

In *United States v. Behan* (1884), 110 U. S. 338; 4 Sup. Ct. 81, 28 L. Ed. 168, the Supreme Court of the United States, in distinguishing between suits upon contract or upon the *quantum meruit* where one party had put an end to the contract, and actions for damages occasioned by the breach or repudiation of an executory contract, said: "But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained."

In *Roehm v. Horst, supra*, the Supreme Court of the United States quoted with approval from an English decision the following: "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; \* \* \* It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the

promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. \* \* \*

“ ‘But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract.’ \* \* \*

“ ‘It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards, or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.’ ”

In the case of *Lake Shore, etc., R. Co. v. Richards*, *supra*, the subject under consideration was treated in an exhaustive opinion which reviews many of the decided cases in England and America. Lawyers' Reports Annotated gives extensive notes and cites numerous decisions bearing on the general subject.

In the course of the opinion the court said: “It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the

injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover, under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery the plaintiff must allege and prove performance upon his part, or a legal excuse for nonperformance.”

In the same opinion the court also said: “Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract had been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. \* \* \*

“Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages.”

In the case of *Anvil Mining Co. v. Humble, supra*, the court said: “Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused.”

In *Bond v. Carpenter, supra*, the court considered a case for damages for breach of an executory contract, involving the question of the plaintiff's readiness and willingness to perform after breach of the defendant, and said: “We think, if this was so, that the plaintiff was entitled to treat the contract as terminated by the defendant, and if it was wrongfully terminated that he was entitled to recover for the breach thereof, without showing that he continued to be ready and willing to perform his part after such termination. The defendant's request to the court to charge that it was incumbent on the plaintiff to show

that he was ready and willing 'at all times,' meaning as we understand that he was ready and willing continuously to the end of the year for which the contract was to run, was therefore rightly refused."

The act of bringing an action, or taking legal steps to enforce a contract, amounts to an election by the party not to rescind it on account of anything

5. known to him, and where a party institutes a suit for damages for the breach of an executory contract, his action in so doing is notice to the other party of his election to treat the contract as breached and at an end except for the purposes of ascertaining the damages occasioned by such breach. An election so made is conclusive against the party making it. 3 Elliott, Contracts §2026; *Cole v. Smith* (1899), 26 Colo. 506, 58 Pac. 1086, 1087; *Conrow v. Little* (1889), 115 N. Y. 387, 393, 22 N. E. 346, 5 L. R. A. 693; *Graves v. White* (1882), 87 N. Y. 463, 465.

It follows from the foregoing that the court did not err in its conclusions of law.

While we have not considered the case from the standpoint of the complaint, our examination of the briefs convinces us that the points relied on, if duly presented, fail to show reversible error under the law as above stated and the decisions cited. This is also true for another reason as applied to two of the principal points in appellant's contention, viz.: (1) That appellee failed to notify appellant of his election to treat the contract as breached, and of his intention to seek to recover the damages caused by such breach; (2) that it does not appear either in the complaint or finding that appellee was ready, willing and able to pay the premium due under his original policy.



Assuming, without deciding, that the complaint and memoranda accompanying appellant's demurrer thereto are duly identified, we nevertheless

6. find an entire absence from such memoranda of any point challenging the sufficiency of the complaint for either of the foregoing reasons. By such failure appellant waived any error based thereon either as to the sufficiency of the complaint or in any of the subsequent proceedings of the trial. *Cincinnati, etc., R. Co. v. Gross* (1917), 186 Ind. 471, 114 N. E. 962; *Dunham v. Jones* (1915), 184 Ind. 46, 48, 110 N. E. 203; *Hedekin Land, etc., Co. v. Campbell* (1916), 184 Ind. 643, 112 N. E. 97.

The views of appellant seem to result from its failure to accept the law as announced in former decisions dealing with the same reinsurance contract, and questions analogous to most of those presented by this appeal, and also by a failure to distinguish between the law applicable to a suit for damages for the breach of an executory contract like the one at bar, and those which seek a recovery upon the contract, or some theory other than that of damages for a wrongful breach or repudiation of such contract.

The propositions above announced also show that the court did not err in sustaining the demurrer to the third paragraph of answer, which set up the details of the transactions and the reinsurance contract, and sought to show that appellee was bound by all of its provisions and that the liens charged against his policy and the increase in his premium were binding on him, and that his failure to pay such premium is a bar to his recovery in this suit. *Wagner v. Supreme Lodge, etc., supra*; *Willcuts v. Northwestern, etc., Ins. Co., supra*.

Several attempted assignments of error pre-

7. sent no question, because, if proper at all, they deal with matter that should be assigned as grounds for a new trial.

There is an attempt in the motion for a new trial to challenge the sufficiency of the evidence and to assert that the decision is contrary to law.

A new trial was asked for the alleged reason that “the decision and judgment of the court are not sustained by sufficient evidence,” and “because

8. the decision and judgment of the court are contrary to law.” Under our statute, as interpreted by numerous decisions, such assignments are unauthorized and cannot be recognized as grounds for a new trial. *Bradford v. Wegg* (1914), 56 Ind. App. 39, 102 N. E. 845, and cases cited; *Hall v. McDonald* (1908), 171 Ind. 9, 18, 85 N. E. 707.

Appellant stated as one of the grounds of its motion for a new trial that “the assessment of the amount of the recovery is erroneous in this, that said amount of recovery is too large.”

Appellee contends that no question is presented as to the amount of the judgment, and that in any event it cannot be disturbed on appeal because there is evidence tending to sustain the amount of damages found to be due appellee.

The fourth subdivision of §585 Burns 1914, §559 R. S. 1881, authorizes the granting of a new trial for “excessive damages,” but by numerous deci-

9. sions it applies only in cases of torts. *Lake Erie, etc., R. Co. v. Acres* (1886), 108 Ind. 548, 550, 9 N. E. 453; *McCormick, etc., Mach. Co. v. Gray* (1888), 114 Ind. 340, 345, 16 N. E. 787; *City of Indianapolis v. Woessner* (1913), 54 Ind. App. 552, 557, 103

N. E. 368; *Conner v. Andrews Land, etc., Co.* (1904), 162 Ind. 338, 350, 70 N. E. 376.

In a certain sense a wrong is involved in every breach of a contract. But such wrong may be distinguished from the wrong which constitutes a tort.

In a suit for damages for the breach of a contract, the action arises out of the agreement of the parties, and is generally denominated an action *ex con-*

10. *tractu*; whereas the right of action for a tort arises out of a breach of duty fixed by law, is independent of the will or agreement of the parties, and is usually denominated an action *ex delicto*. Pollock, Torts (10th ed.) 3; 28 Am. and Eng. Ency. Law 255; 38 Cyc 426-429; *Nevin v. Pullman Palace Car Co.* (1883), 106 Ill. 222, 46 Am. Rep. 688; *Galveston, etc., R. Co. v. Hennegan* (1903), 33 Tex. Civ. App. 319, 76 S. W. 452; *Central R., etc., Co. v. Roberts* (1893), 91 Ga. 513, 18 S. E. 315.

The case at bar is founded on the breach of a contract and not upon the violation of any duty imposed by law independent of the contractual relations of the parties. It is an action *ex contractu*, though not a suit upon the contract as in cases where a recovery is sought according to the terms of the contract.

The fifth subdivision of §585, *supra*, was properly followed by appellant in seeking a new trial on the ground that the amount of the recovery was

11. erroneous, being too large. *American Quarries Co. v. Lay* (1906), 37 Ind. App. 386, 391, 73 N. E. 608; *Boggs v. Toney* (1912), 50 Ind. App. 289, 290, 98 N. E. 306, and cases cited; *Smith v. Barber* (1899), 153 Ind. 322, 332, 53 N. E. 1014; *Lake Erie, etc., R. Co. v. Acres, supra*; *Conner v. Andrews Land, etc., Co., supra*; *Brown v. Guyer* (1917), 64 Ind. App. 356, 115 N. E. 947, 948.

The finding of facts states in substance that appellee was damaged in the sum of \$1,035.74 by the wrongful breach of his contract of insurance, or the lapsing of his policy for failure to acknowledge the validity of the liens charged against the same, and for failure to pay the unauthorized premium demanded of him as the only condition under which his insurance would be continued.

The facts bring the case within the rule applicable for the measure of damages in such cases.

There is evidence tending to sustain the finding and the amount is not shown to be so large as to warrant the reversal of the judgment on that account. *Blair v. Blair* (1892), 131 Ind. 194, 30 N. E. 1076; *Conner v. Andrews Land, etc., Co., supra*; *Mutual Reserve, etc., Assn. v. Ferrenbach* (1906), 144 Fed. 342, 75 C. C. A. 304, 309, 7 L. R. A. (N. S.) 1163; *Keyser v. Mutual Reserve, etc., Assn.* (1901), 70 N. Y. Supp. 32; *Ebert v. Mutual Reserve, etc., Assn.* (1900), 81 Minn. 116, 83 N. W. 506, 509, 510, 834, 84 N. W. 457; *Merrick v. Northwestern, etc., Ins. Co.* (1905), 124 Wis. 221, 102 N. W. 593, 595, 109 Am. St. 931.

Our examination of the whole record and the several cases dealing with the same reinsurance contract convinces us that the case was fairly tried and  
12. a correct result reached. Appellant was deprived of no substantial right, and no intervening error is pointed out which was harmful to appellant or would justify a reversal of the judgment. §§407, 700 Burns 1914, §§398, 658 R. S. 1881; *First Nat. Bank v. Ransford* (1914), 55 Ind. App. 663, 669, 104 N. E. 604, and cases cited.

Judgment affirmed.

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Hottel, C. J., Ibach, P. J., Dausman, Caldwell and Batman, JJ., concur.

ON PETITION FOR REHEARING.

FELT, J.—Appellant's learned counsel insist that the court erred in the original opinion in failing to consider the tenth ground of its motion for a new trial, which alleges that certain enumerated special findings "are not nor are either of them sustained by sufficient evidence."

Such assignment of causes for a new trial is unauthorized by our statute and has been held insufficient.

*Scott v. Collier* (1906), 166 Ind. 644, 647, 648, 13. 78 N. E. 184; *Sievers v. Peters Box, etc., Co.* (1898), 151 Ind. 642, 656, 50 N. E. 877, 52 N. E. 399; *Vandalia Coal Co. v. Price* (1912), 178 Ind. 546, 559, 97 N. E. 429; *Smith v. McDonald* (1912), 49 Ind. App. 464, 465, 97 N. E. 556; *Hamrick v. Hoover* (1908), 41 Ind. App. 411, 415, 84 N. E. 28; *Major v. Miller* (1905), 165 Ind. 275, 278, 75 N. E. 159.

On re-examination of the briefs we find that all material questions duly presented were considered and decided. We are content with the decision, and the petition for a rehearing is overruled.

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CITY OF NEW ALBANY v. KIEFER.

[No. 9,816. Filed May 29, 1919.]

1. MUNICIPAL CORPORATIONS.—*Street and Sidewalks.—Duty to Repair.*—It is the duty of a city to keep its streets and sidewalks in reasonable repair and free from dangerous defects to the full width thereof. p. 292.
  2. MUNICIPAL CORPORATIONS.—*Defective Sidewalks.—Injuries to Pedestrians.—Liability.*—Although a city is not an insurer of the
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safety of its streets and sidewalks, it is required to keep them in reasonably safe condition for traveling, and failing so to do, it is liable to a pedestrian, exercising reasonable care, who is injured because of defects therein. p. 292.

3. *APPEAL.—Matters Reviewable.—Ruling on Motion for New Trial.—Briefs.—Failure to Set Out Motion.*—Error, if any, in overruling the motion for new trial is waived, where neither the motion nor its substance is set out in appellant's brief. p. 293.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by Lena Kiefer against the city of New Albany. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Jewett, Bulleit & Jewett*, for appellant.

*Evan B. Stotsenburg, John H. Weathers* and *George C. Kopp*, for appellee.

NICHOLS, P. J.—The appellee, while traveling on one of the public sidewalks in the city of New Albany, sustained injuries by reason of the defective condition of the said sidewalk, and this action is for damages for the injury received. The complaint was in one paragraph, to which the appellant filed its demurrer with memoranda, which demurrer was overruled by the court, to which ruling the appellant excepted. The case was put at issue on a general denial and submitted to a jury for trial, which returned a verdict for \$1,100 in favor of the appellee, \$300 of which verdict was remitted by the appellee. Appellant filed its motion for a new trial, which was overruled and it now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling of appellant's demurrer to the complaint; (2) overruling of appellant's motion for a new trial as the verdict of the jury was not sustained by sufficient

evidence; (3) the damages assessed by the jury were excessive, and the court erred in overruling appellant's motion for a new trial for that reason.

The complaint avers: That the injury occurred upon Spring street in said city, which was a public street with sidewalks about ten feet wide upon either side for the use of foot passengers; that at the place of the accident involved the sidewalk was made of brick; that on August 13, 1914, the appellant carelessly and negligently suffered and permitted the sidewalk on the north side of said street to be defective and out of repair; that the bricks constituting the pavement were out of place and loose and liable to and would turn under the foot if stepped upon, and that such bricks were a dangerous obstruction to pedestrians using said sidewalk, and that they were liable to be thrown thereby. Appellee says that appellant negligently and carelessly maintained the said sidewalk in an unsafe and dangerous condition, by maintaining and permitting the bricks thereof to be out of place and loose where the public used the same to travel upon, without maintaining or keeping any guard or signal of the existence of the same to notify or warn the public of the location; that such unsafe condition had existed for more than six months prior to the date of the injury, and that appellant, its officers and agents well knew of the existence of such dangerous and unsafe conditions as aforesaid long before the injury to appellee, or by the exercise of ordinary care said appellant, its officers, or agents could have known of the same in time to have repaired it or to have notified appellee of its unsafe condition; but appellee says that she had no knowledge whatever of said dangerous and unsafe condition of said

sidewalk. Appellee says that she was on August 13, 1914, lawfully using said sidewalk, and while using due care she stepped upon one of said loose bricks where others were out of place, and, by reason of the carelessness and negligence of the appellant in maintaining such sidewalks with bricks out of place and loose, her foot turned and she was thrown down upon the hard sidewalk, thereby spraining, injuring, straining and lacerating the tendons, muscles and ligaments of the right foot, right leg and ankle, whereby she was caused to suffer, still suffers and will continue to suffer great bodily pain and mental anguish, and has been permanently injured and crippled, all to her damage in the sum of \$3,500.

In discussing its demurrer, appellant says that the complaint failed to show that the appellee was required to use that part of the sidewalk over which she was walking when injured, and that it does not appear that a safe way had not been provided by the appellant on said sidewalk over which the appellee might have traveled at the time of the alleged injury. We do not understand it to be the law that, unless the appellee was required to use the public way, she would be precluded from a recovery for the injuries suffered by reason of such use. It is the duty of the city to

keep its streets and sidewalks in reasonable

1. repair and free from dangerous defects to the full width thereof. *City of Decatur v. Stoops* (1899), 21 Ind. App. 397, 52 N. E. 623; *Town of*

2. *Odon v. Dobbs* (1900), 25 Ind. App. 522, 58 N. E. 562. It is true, as contended by appellant,

that the city of New Albany did not insure the appellee against injury, but, while it is true that such city is not an insurer of the safety of its streets and side-



walks, yet it was required to keep them in a reasonably safe condition for traveling, and, failing so to do, it was liable to a pedestrian passing over them if, while such pedestrian was exercising reasonable care, he was injured because of the defects therein. *Town of Gosport v. Evans* (1887), 112 Ind. 133, 13 N. E. 256, 2 Am. St. 164; *Higert v. City of Greencastle* (1873), 43 Ind. 574. We hold that the complaint was sufficient against demurrer, and that the demurrer was properly overruled.

The appellant in its brief fails to set out either the motion for a new trial or its substance, and, failing so to do, it has waived any errors that may

3. have been committed by the trial court in overruling it. *Tongret v. Carlin* (1905), 165 Ind. 489, 75 N. E. 887; *Scott v. State* (1911), 176 Ind. 382, 96 N. E. 125; *Lee v. State* (1912), 177 Ind. 232, 97 N. E. 785; *Harrold v. Whistler* (1916), 60 Ind. App. 504, 111 N. E. 79. Even if the second and third assignments of error presented any question as to the ruling of the court upon the motion for a new trial, we have examined the evidence in this case and hold that it was sufficient to sustain a verdict (*City of Valparaiso v. Schwerdt* [1907], 40 Ind. App. 608, 82 N. E. 923), and that the damages assessed by the jury, deducting the remittitur, were not excessive.

Judgment is affirmed.

## SPENCER COMMERCIAL CLUB v. BARTMESS ET AL.

[No. 9,888. Filed May 29, 1919.]

1. **BANKRUPTCY.—Claims.—Allowance.—Effect.**—The action of a referee in bankruptcy in the allowance of a claim is *res adjudicata* as to all who have been made parties to the proceedings in the bankruptcy court. p. 302.
2. **BANKRUPTCY.—Bankrupt's Estate.—Custody.—Jurisdiction of Court.—Determination of Claims.**—Upon the filing of a petition in bankruptcy followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine all adverse or conflicting claims thereto, whether of title or liens. p. 302.
3. **ESTOPPEL.—Estoppel by Conduct.—Failure to Assert Title to Land.**—Where a commercial club had its president convey land knowing that he had previously conveyed it to a trustee, and for more than two years after grantee's bankruptcy failed to assert any claim to the property, though the bankruptcy court had adjudged valid a mortgage given by the grantee, the club was estopped from thereafter claiming the property as against the mortgagee. pp. 303, 304.
4. **ESTOPPEL.—Estoppel by Words or Conduct.**—When a person by his words or conduct causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own position, the former is precluded from averring a different state of things as existing. p. 303.
5. **ESTOPPEL.—Estoppel by Deed.—Interest Conveyed.**—Where the president of defendant commercial club, in his capacity as trustee of an insolvent company, transferred the company's real estate to another under an agreement that if plaintiff fulfilled a certain contract the land should be deeded to him, and if he failed it should be conveyed to the club, and subsequently, after certain changes were made in the contract, the directors of the club ordered a deed prepared conveying the property to plaintiff and had it executed by its president as such trustee, although unknown to plaintiff, he had filed his final report and been discharged, such deed was sufficient to pass to grantee whatever equitable interest the club had in the land, notwithstanding the conveyance was ineffectual to carry the legal title. p. 303.
6. **ESTOPPEL.—Estoppel by Deed.**—The owner of real estate attesting a deed made by a person having no title, if such owner knows

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the contents of the deed, will by attesting it be estopped from setting up his own title against the grantee and his privies. p. 304.

From Owen Circuit Court; *Robert W. Miers*, Judge.

Action by Ulysses S. Bartmess against the Spencer Commercial Club, which cross-complained, bringing in as defendants May Bartmess and others. From a judgment in favor of May Bartmess, the defendant appeals. *Affirmed*.

*Homer Elliott* and *Inman H. Fowler*, for appellant.

*Hickam & Hickam* and *Fesler, Elam & Young*, for appellees.

McMAHAN, J.—The appellee Ulysses S. Bartmess began this action by filing his complaint to quiet title to certain real estate in Owen county, Indiana. The appellant filed a cross-complaint against the original plaintiff and a large number of other parties, including May Bartmess, wife of Ulysses S. Bartmess, wherein the appellant asked that the title to said real estate be quieted in it. The cause being at issue was submitted to the court for trial. The court, at the request of the parties, found the facts specially and stated its conclusions of law thereon.

The facts, as found by the court, are substantially as follows: The appellant is a corporation organized for the purpose of procuring factories to locate and operate in the town of Spencer, and for that purpose purchased forty acres of land adjoining the town and platted it into lots which it sold, the proceeds being used to induce factories to locate and operate in said town.

Prior to September 28, 1910, the Spencer Co-operative Bottle Company was the owner of the land in

controversy, upon which there was located a bottle factory, and, being insolvent, made an assignment for the benefit of its creditors, and deeded said real estate and factory to John H. Smith as trustee, he being the president of the Spencer Commercial Club.

The appellant, in order to induce the appellee Ulysses S. Bartmess to purchase the real estate and bottle factory formerly owned by said bottle company, and to operate said factory, entered into a written contract with said Bartmess, wherein it agreed to, and did, convey to said Bartmess the title to fifty-nine lots in appellant's said subdivision, and, said lots having been sold on contracts, assigned to said Bartmess the contracts of the purchasers for the unpaid purchase money for said fifty-nine lots. The appellant also agreed to take charge of said sale contracts, collect the money due on them, and turn over to Bartmess \$7,000 thereof, with interest until paid, as a bonus for purchasing, repairing and operating the factory. Bartmess agreed to execute deeds to the purchasers of the lots as the appellant turned over the purchase money to him. Bartmess borrowed \$7,000 from the Exchange Bank of Spencer and assigned said lot contract to the bank as collateral to secure his promissory note for \$7,000. Bartmess never paid anything on said note except \$350, which the bank collected on said contracts and which it applied on said note. The appellant also agreed to give Bartmess its promissory note for \$15,000, secured by mortgage on certain other lots in said addition, said Bartmess agreeing to put said bottle factory in good repair and to operate it with an average of twelve shops and employing approximately 100 men for not less than nine months a year for a period of three

years. It was agreed that said Smith, as trustee of said bottle company, should deed said factory and real estate in controversy to some citizen of Spencer, who should hold the same pending performance of said contract by Bartmess, and, if he performed the contract, the plant was to be deeded to him, and, if he failed, it should be deeded to appellant.

Smith as such trustee obtained an order from the Owen Circuit Court authorizing the sale of the real estate in controversy at a private sale, and he thereupon reported that he had sold the same to said Bartmess for \$15,000, which sale was approved and, by agreement between appellant and appellee Bartmess, the deed was made to Temple G. Pierson as trustee. Said deed was reported to the court and entered in the order book of said court, but was not recorded in the recorder's office of said county. The appellant executed its note to said Bartmess for \$15,000, and he assigned said note to Smith as trustee in full payment of the purchase price of said real estate.

Said Bartmess began to operate said bottle factory in January, 1911, and continued to operate it until August 11, 1912, when he closed it, and no further business was done therein.

At a meeting of the board of directors of appellant in August, 1912, Bartmess requested that appellant make him a deed of the real estate in controversy, saying that his business was prosperous, but that he could not proceed until the plant was overhauled; that he meant to reorganize the business and erect a steel building; that he must raise money, but could not do so unless the title was in his name, so he could float an issue of stock or bonds; that, inasmuch as appellant had not collected on the lots, he ought not to be

required and compelled to operate the plant three years before obtaining a deed. Appellant agreed to this, and a few days later, acting under orders of the board of directors of appellant, Homer Elliott, its secretary prepared a deed for the property to Bartmess, and had said Smith, as trustee for the bottle company, execute the same, forgetting that Smith as such trustee had prior thereto made a deed to Pierson, as before stated, and that he had made his final report and had been discharged. Bartmess, not knowing such facts or that the deed did not convey to him a perfect title, accepted said deed, recorded it September 23, 1912, and continued in possession of the property under the deed. No deed was ever executed by Pierson, and he still holds the legal title to the real estate as trustee for appellant and Ulysses S. Bartmess.

Bartmess never repaired said plant, and did not resume operations, but soon after obtaining said deed made a voluntary assignment, and was afterwards, on petition of some of his creditors, adjudged a bankrupt, said Homer Elliott, the secretary of appellant, being elected as trustee of the bankrupt estate and qualified as such. That said Bartmess in September, 1912, and within a few days after securing the deed, executed a mortgage on said real estate to his wife, May Bartmess, to secure a note for \$5,000 that his wife had loaned him in 1910; that Mrs. Bartmess filed her claim on said note and mortgage with the referee in bankruptcy; that said Elliott as trustee filed his answer to said claim and also his petition asking that it be held fraudulent and void, alleging that it was executed to obtain a preference and that it was for an antecedent debt. A trial was had on such claim

at which John H. Smith, president, and Homer Elliott, secretary, of appellant, were present and testified as witnesses for said Elliott in his effort to prevent the allowance of said claim, and aided and counseled with the attorneys for said Elliott in the defense to said claim. Mr. and Mrs. Bartmess were also present at such trial and testified. The referee found that the claim of Mrs. Bartmess should be allowed as a valid claim secured by said mortgage, with interest from August 1, 1912, and a decree was entered accordingly. The appellees Hickam and Hickam, and Elam and Fesler, having been employed as attorneys for Mr. and Mrs. Bartmess in said bankruptcy proceedings on October 23, 1913, took a note for \$1,000 from Bartmess and his wife, said note being also secured by a mortgage on the real estate in controversy. Bartmess was discharged as a bankrupt on July 21, 1913, but, being a householder and entitled to an exemption of \$600, said real estate was set off to him subject to said mortgage, and his estate was settled as one with no assets.

The said note of \$7,000 given to the Exchange Bank was liquidated and discharged in said bankruptcy proceedings. The full possession of the real estate in controversy was turned over to Bartmess by said Elliott, as trustee in bankruptcy, in pursuance of an order of the court, and he has ever since had full control and possession over the same, all of which was done with the knowledge of, and without objection on the part of, appellant.

The court concluded as a matter of law: (1) That appellant's title to the real estate should be quieted as to all defendants except Mrs. Bartmess; and (2) that her mortgage was a valid and subsisting lien upon the real estate.

The errors assigned in this court are that the court erred in its conclusions of law.

The sole question for our determination relates to the validity of the mortgage given to appellee May Bartmess. She is the only appellee who has filed a brief in this court, so, when we refer to the appellee, it will be understood that we refer to her.

The appellant insists that this mortgage was given to secure a pre-existing debt, and was therefore void as against appellant, while appellee insists that under the facts her mortgage is valid, that the proceedings in the bankruptcy court amount to an adjudication of the validity of her mortgage, and that the appellant's conduct has been such as to estop it from asserting title to the real estate in controversy.

Appellant contends that a mortgagee who takes a mortgage to secure a pre-existing debt must at the time of taking the mortgage, in order to make it valid as against prior and superior equities, have paid a new and valuable consideration therefor, canceled or surrendered his old debt, or in some way placed himself in a worse condition than he was before the mortgage was given.

Appellee does not attempt to controvert this legal position as contended for by appellant. She insists that the original contract between appellant and her husband was superseded by an agreement made in August, 1912, by the terms of which the appellant agreed to give her husband a deed; that the deed was prepared by the secretary of appellant and signed by John H. Smith, who was president of appellant, they both acting under the authority and direction of the board of directors of appellant; that this deed was intended to, and in equity did, pass all the interest of



appellant; that it was effective for that purpose and constituted a complete transfer of the equitable title.

At the time this deed was executed the order book entries in the Owen Circuit Court in the receivership of the bottle company disclosed that Smith, as trustee, had sold the property to Bartmess for \$15,000; that Smith reported said sale to the court; that it was approved, and that a deed had been ordered. The deed, however, by agreement, was made to Pierson, and not to Bartmess, but was never recorded in the recorder's office. It was the intention of the board of directors of appellant to convey the fee-simple title of the real estate in controversy to Ulysses S. Bartmess, and, in order to carry out that intention, said directors authorized and directed its secretary, Homer Elliott, to prepare a deed for that purpose, which he did, but, overlooking the fact that a deed had been made to Pierson as trustee, he named John H. Smith as grantor, instead of Pierson. The deed was properly signed by John H. Smith, acknowledged and delivered to Mr. Bartmess with the intention and belief of all the parties, including appellant, that it did in fact convey the title to said real estate to Ulysses S. Bartmess. After the deed was executed and recorded, the mortgage to appellee was executed, and, when the proceedings in bankruptcy were pending, all the right, title and interest of Ulysses S. Bartmess in said real estate, including the possession, were in Homer Elliott, the trustee in bankruptcy. When the appellee filed her note and mortgage as a claim against said estate, Homer Elliott, who was the secretary of appellant and the trustee in bankruptcy, and who is one of appellant's attorneys in this appeal, resisted the allowance of appellee's claim.

He and John H. Smith, president of appellant, the grantor in the deed to Bartmess and the cashier of the Exchange Bank, which was also a creditor of said bankrupt estate, were present at the trial of appellee's claim, testified as witnesses against her, and aided and counseled with the attorneys for the trustee in bankruptcy, doing all in their power to have the claim of appellee disallowed. They were then contending that the real estate now in controversy belonged to the estate of Ulysses S. Bartmess, bankrupt, and that it should be sold by Homer Elliott as trustee to pay the debts of said Bartmess, a position entirely inconsistent with their present one.

The facts as found by the court do not disclose whether the appellant was named as a creditor or

interested party in the proceedings in bankruptcy. If appellant was a party to the proceedings in bankruptcy, our task would be easy and our course clear, as it is universally held that the action of a referee in bankruptcy in the allowance of a claim is *res adjudicata* as to all who have been made parties to the proceedings in the bankruptcy court.

Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims owner-

ship passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine all adverse or conflicting claims thereto, whether of title or liens. *In re Schermerhorn* (1906), 145 Fed. 341, 76 C. C. A. 215. See, also, *In re Kellogg* (1903), 121 Fed. 333, 57 C. C. A. 547.

Ought the appellant, in view of all the facts and

circumstances disclosed in this case, be permitted, after a delay of over two years, after it has

3. stood by and with knowledge permitted the court and the public to deal with the property as belonging to Ulysses S. Bartmess, now claim the property free and clear of a claim that was litigated in the bankrupt court, and which was by that court found to be a valid lien on said real estate?

We would remind appellant that "he who keeps silent when duty commands him to speak shall not speak when duty commands him to keep silent." Appellant, by its act in having John H. Smith make the deed to Bartmess, represented that Smith had the power and authority to make such deed and to convey the title, and it ought in equity to make that representation true.

The rule of law is clear that, when one by his words or conduct causes another to believe the existence of a certain state of things, and induces him

4. to act on that belief so as to alter his own position, the former is precluded from averring a different state of things as existing. *Pickard v. Sears* (1837), 6 Ad. & E. 469; *Stevens v. Dennett* (1872), 51 N. H. 324.

The appellant had an equitable interest in the real estate which it could have conveyed to Bartmess, and it is our judgment that whatever title it could

5. have passed by deed did in equity pass by the deed from Smith, trustee, to Bartmess. As said in *Fallon v. Kehoe* (1869), 38 Cal. 44, 99 Am. Dec. 347: "We apprehend there can be but little doubt on this point, and we do not understand counsel as controverting the proposition, that, if the true owner conveys the property by any name, the conveyance,

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as between the grantor and grantee, will transfer the title." See, also, *Middleton v. Findla* (1864), 25 Cal. 76.

The owner of real estate attesting a deed made by a person having no title, if such owner knows the contents of such deed, will, by attesting it, be

6. estopped from setting up his own title against the grantee and his privies. *Devlin, Real Estate* §1286a; *Equitable Loan, etc., Co. v. Lewman* (1905), 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879; *Wakefield v. Brown* (1888), 38 Minn. 361, 37 N. W. 788, 8 Am. St. 671; *Müller v. Bingham* (1856), 29 Vt. 82.

The appellant is in no position to claim that its equities are equal or superior to those of appellee. In

fact, it secured all, if not more than, it was

3. entitled to when the trial court found that its title should be quieted as to the claims of the appellees other than May Bartmess.

The court did not err in its conclusions of law.

Judgment affirmed.

### CATHCART v. BREWER, GUARDIAN.

[No. 9,844. Filed May 29, 1919.]

1. **APPEAL.—Briefs.—Waiver of Error.**—Questions presented in a motion for new trial are waived where appellant fails to state in his brief any proposition or authorities to sustain them. p. 306.
2. **APPEAL.—Review.—Ruling on Motion for New Trial.—Specifications.—Sufficiency.**—A specification in a motion for new trial that "the verdict of the jury is contrary to law and the evidence," is not a ground for new trial under the statute and presents no question for review. p. 306.
3. **APPEAL.—Review.—Ruling on Motion for New Trial.—Specifications.—Instructions.—Exception in Gross.—Availability.**—Where

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defendant specified, as a ground for new trial, that the court erred in giving instructions Nos. 1 to 25, and in giving each of such instructions, an exception that "to the giving of said instructions the defendant excepts," was in gross and not available, in the absence of any claim that all of the instructions were bad. p. 306.

4. *APPEAL.—Briefs.—Presenting Questions for Review.—Competency of Witness.*—Appellant's contention that the court erred in permitting a witness to testify cannot be sustained, where appellant's brief fails to show that any objection was made to the witness testifying, that the court made any ruling in relation thereto, or that any exception was taken. p. 307.
5. *APPEAL.—Record.—Instructions.—Authentication.*—Where instructions tendered by appellant are not authenticated in any manner as required by the statute, they have no legitimate place in the record, and are not presented for consideration on appeal. p. 307.

From Orange Circuit Court; *Bayless Harvey*, Special Judge.

Action by Jonas E. Brewer, guardian of Mary C. Hagaman, a person of unsound mind, against John M. Cathcart. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Elliott & Houston* and *Arthur McCart*, for appellant.

*James M. Tippen, Buskirk & Buskirk* and *Wilbur W. Hottel*, for appellee.

McMAHAN, J.—This was an action by the appellee, as guardian of Mary C. Hagaman, a person of unsound mind, against appellant for defrauding and cheating appellee's ward in the sale and exchange of certain real estate and personal property. There was a trial by jury, which resulted in a verdict and judgment against appellant. The appellant filed a motion for a new trial, which was overruled, and he appeals, assigning the overruling of said motion as error.

All questions presented in the motion for a new trial are waived except specifications Nos. 4,

1. 7, 8 and 9, by reason of the failure of appellant to state any proposition or any points to sustain them.

The fourth specification in the motion for a new trial is that "the verdict of the jury is contrary to law and the evidence." This specification for

2. a new trial is not known to the statute, and therefore does not present any question. *Jennings v. Ingle* (1905), 35 Ind. App. 153, 73 N. E. 945.

The seventh specification is that the court erred in giving to the jury, at the request of appellee, instructions Nos. 1 to 25, and that the court erred in giving each of these instructions.

Appellant in his brief contends that the court erred in giving each of said instructions Nos. 2, 7, 8, 17 and 18. No objection is made to the other twenty

3. instructions so given by the court. Appellee has called our attention to the fact that the exception taken to the giving of the instructions was a joint exception. The record relative to appellant's exception reads as follows: "Of said instructions so tendered the court gave instructions numbered from one to twenty-five, both inclusive, and to the giving of said instructions the defendant excepts."

This exception was in gross as to all of said instructions Nos. 1 to 25, and to be available all must be bad. It not being claimed that all of them are bad, appellant's exception is not available. *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 80 N. E. 538; *Kelly Atkinson Constr. Co. v. Munson* (1913), 53 Ind. App. 619, 101 N. E. 510.

The appellant next contends that the court erred in permitting the witness Mary C. Hagaman to tes-

tify. The appellant in his brief has failed to

4. show that any objection was made to her testifying, or that the court made any ruling in relation thereto, or that any exception was taken. If any objection was made to this testimony, which was overruled, and an exception saved, Rule 22 requires that appellant's brief shall contain a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. As said by the Supreme Court in *Inland Steel Co. v. Smith*, *supra*: "It has been uniformly held by this court that, whenever appellant fails to specify the page and line where the ruling excluding or admitting evidence may be found, the court will not search the record to find it, but will disregard any such question."

It is also contended that the court erred in refusing to give instruction No. 4 tendered by appellant. Appellee insists that no exception was reserved

5. to such refusal, for the reason that the appellant has failed to make the instructions tendered by him a part of the record. The instructions tendered by appellant are not authenticated in any manner as required by the statute; hence they have no legitimate place in the record, and are not presented for our consideration. *Muncie, etc., Traction Co. v. Black* (1909), 173 Ind. 142, 89 N. E. 845; *Indianapolis, etc., Transit Co. v. Walsh* (1909), 45 Ind. App. 42, 90 N. E. 138.

There being no error shown, the judgment is affirmed.

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**Haislup v. UNION ASPHALT CONSTRUCTION COMPANY.**

[No. 9,857. Filed May 29, 1910.]

**MUNICIPAL CORPORATIONS.—Public Improvements.—Assessments.—Failure to Object.—Estoppel.**—Under §§8710, 8714, Acts 1909 p. 412, where a property owner fails to avail himself of his right to object to the improvement of a street, but stands by and silently watches the completion of the work, he cannot avoid payment for the benefits he has received, even if the proceedings under which the improvement was made are void.

From Marion Circuit Court (25,982); *Louis B. Eubank*, Judge.

Action by Alfred T. Haislup against the Union Asphalt Construction Company, in which defendant cross-complained. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Charles B. Clarke* and *Walter C. Clarke*, for appellant.

*Caleb S. Denny*, *George L. Denny*, *Eugene C. Miller* and *Joseph W. Miller*, for appellee.

**NICHOLS, P. J.**—Appellant filed his complaint in the Marion Circuit Court against the appellee to quiet title to certain real estate in the city of Indianapolis, located within 150 feet of New York street, in said city, which said real estate was subject to assessment lien for the improvement of a portion of said street passing in front of said real estate. Appellee filed his cross-complaint in such cause against appellant to foreclose said lien. Issues were formed on both the complaint and the cross-complaint, and there was a trial by the court, which resulted in a finding and judgment against the appellant on his complaint, and



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a finding and judgment against the appellant on the said cross-complaint, foreclosing the appellee's lien as set up in his cross-complaint. Appellant filed his motion for a new trial, which was overruled, to which ruling of the court appellant excepted, and now prosecutes this appeal.

The only error relied upon for a reversal is the overruling of appellant's motion for a new trial, which alleges as errors that: "(1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law."

As there were two cases tried, one on the complaint, and one on the cross-complaint, counsel for appellee question whether the motion for a new trial and the assignments therein are sufficient to present any matter for our consideration. We note, however, that this case seems to be a test case, and that thirty-six other parties who think themselves aggrieved are awaiting the result of this suit. We therefore deem it better to decide the case on its merits.

The complaint was in the usual short form to quiet title.

The cross-complaint avers in substance that: On April 14, 1915, the board of public works of the city of Indianapolis adopted a declaratory resolution, No. 7888, for the improvement of New York street, from the east property line of Randolph street to the west property line of Jefferson avenue, in said city, with full details, drawings and specifications for said work which were then on file in the office of said board; that appellee was one of the parties who submitted bids, and, being the lowest bidder, was awarded the contract for the construction of said improvement. The costs and expenses of said work were to be as-

sessed against, and collected from, the owners of the lots and parcels of land bordering on and adjacent thereto, according to their benefits. On June 23, 1915, appellee entered into an agreement with such board for such improvement, and gave his bond for the faithful performance of his agreement, which was approved. The appellee completed said work in accordance with the specifications and stipulations of the agreement to the satisfaction of the board, and the same was duly accepted. At the time the contract was let appellant owned, and still owns, certain real estate, describing it, adjacent to the part of said street improved. The board made and adopted an assessment roll on November 8, 1915, which was finally approved on November 19, 1915, assessing each lot bordering on or adjacent to said street its pro rata share, the assessment against appellant's lot being \$27.99, said sum to be paid by appellant to appellee. That such assessment has been a lien on appellant's said real estate since June 23, 1915, together with interest thereon since November 19, 1915. Said sum is due and unpaid. The lot cannot be divided and sold in parcels. More than fifteen days before this suit was commenced, appellant was notified by mail of the above assessment and of the place of payment, but he has wholly failed and refused to pay the same. Cross-complainant has been compelled to employ an attorney, and that a reasonable fee for such attorney is \$25. It is provided in §8714 Burns 1914, Acts 1909 p. 412, that in such foreclosure suits no defense shall be allowed upon any irregularity in the proceedings making, directing, or ordering such assessment, nor shall any question as to the propriety or expediency of any improvement or work be therein made. It is fur-

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ther provided by said section that it shall not be necessary in any foreclosure suit to set forth or refer to the proceedings at length or specifically, but it shall be sufficient to state in such complaint the day on which such contract was finally let, the name of the street or highway improved, the amount and date of the assessment, that the assessment is unpaid, and description of the lot or property upon which the assessment was levied. Upon the trial of such foreclosure suit it shall not be necessary to introduce proof of the various proceedings before said board preliminary to the final assessment, but it shall be sufficient to introduce said final assessment roll, or a copy thereof, properly certified, which said roll shall be *prima facie* evidence that all steps required to be taken preliminary thereto were regularly and properly had and taken by and before said board.

By §8710 Burns 1914, *supra*, being a part of the same act as §8714, *supra*, it is provided that, in the event of the execution of any contract for any public improvement, the validity of such contract shall not be subsequently questioned by any person, except in a suit to enjoin the performance of such contract, instituted by such person within ten days from the execution of said contract, or prior to the actual commencement of the work thereunder.

In the trial of the issues, the appellant introduced no evidence. Appellee not only introduced the final assessment roll, which under the statute, as above set out, was all that he was required to do, to make a *prima facie* case, but he further showed that appellant's land against which he sought to enforce his lien was within 150 feet of the street improved, and that appellant lived thereon during all of the time said

improvement was being made; that he had notice, both by publication and by mailing, of the resolution to improve, and of the time set for its hearing; that appellant did not join with forty per cent. of the owners of property abutting on said street, and liable for assessment for the costs of improvement, in filing objections within five days after the making of the final order for the improvement as allowed by §8710, *supra*, nor was such objection filed by any one; that, though he lived on his property within 120 feet of said improvement during all the time the same was being made, and, of course, must have known that the same was being made, he did not at any time object thereto, and did not within ten days after said contract was made, or at any time, bring suit to enjoin the performance thereof; that notice of the time and place of hearing objections to the final assessment was given by publication as required by law, but appellant did not appear at said time. These facts conclusively show that the appellant and his property were both subject to the jurisdiction of the board, and that, under the law as above set out, he had his remedy had he chosen to use it. Having failed to assert it under the law, and having stood by and silently watched the improvement, he cannot now avoid the payment for the benefits he has received (*Anheier v. Fowler* [1913], 53 Ind. App. 535, 102 N. E. 108), not even if the proceedings under which the improvement is made are void. *Vickery v. Board, etc.* (1893), 134 Ind. 554, 32 N. E. 880; *Phillips v. Kankakee Reclamation Co.* (1912), 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C 56.

The judgment is affirmed.

## CALDWELL v. ALLEY ET AL.

[No. 9,847. Filed May 29, 1919.]

1. **APPEAL.—Questions Presented.—Peremptory Instructions.—Bill of Exceptions.**—Where no exception was taken to the giving of a peremptory instruction, but it appears from the record that the bill of exceptions containing the instruction, duly signed by the trial judge, was presented and filed within the time given for filing bills, though not filed until after the praecipe, there was a good-faith effort to comply with the rules of court, and questions arising on the instruction will be reviewed on appeal. p. 319.
2. **NEGLIGENCE.—Evidence.—Directing Verdict.—Duty of Court.**—In an action for wrongful death, if the evidence on any issue is insufficient in law to sustain a verdict in favor of plaintiff, it is the duty of the court to direct a verdict upon such issue against him. p. 319.
3. **ELECTRICITY.—Transmission of Electric Current.—Liability for Injuries.**—Where the furnisher of electricity supplies the same to a customer first through its own wires, and then through wires owned and maintained by the customer, and over which the furnisher has no supervision or control, he is not liable for injury resulting from the negligent manner in which the customer's wires are equipped and maintained. p. 321.
4. **MUNICIPAL CORPORATIONS.—Injuries to Persons.—Wrongful Act of Third Person.**—A city cannot be charged with constructive notice that a private party has placed a live wire where persons bathing in a stream under the city's control may come into contact therewith, in the absence of evidence showing how long the wire has been so located. p. 323.
5. **MUNICIPAL CORPORATIONS.—Injuries to Persons.—Wrongful Act of Third Persons.—Liability of City.**—Even though a city has full power and control over a stream wherein citizens are accustomed to bathe, it is not liable for the death of a bather electrocuted by coming in contact with a live wire negligently and maliciously placed by a third person, where the city had no notice of the existence of the wire. p. 323.
6. **APPEAL.—Presenting Questions for Review.—Refusal of Court to Require Witness to Testify.**—The court on appeal cannot determine whether the trial court's refusal to require a witness to answer questions propounded to him was harmful, even if erroneous, where the complaining party failed to make any statement of what he expected to prove by such witness. p. 323.

From Morgan Circuit Court; *A. M. Bain*, Special Judge.

Action by Emery B. Caldwell against Jesse L. Alley, doing business under the firm name and style of the North Side Sand and Gravel Company, and others. From an adverse judgment, the plaintiff appeals. *Affirmed.*

*Joseph W. Williams, Harry E. Negley and George W. Galvin*, for appellant.

*William A. Pickens, Paul G. Davis, Walter Meyers, Russel J. Ryan, Elmer E. Stevenson and Charles N. Thompson*, for appellees.

NICHOLS, P. J.—This is an action by appellant against the appellees to recover damages for the death of his son by electrocution in Fall creek, a stream running through the city of Indianapolis, Marion county, Indiana. The amended complaint upon which the appellant went to trial was in one paragraph. When the appellant closed his evidence appellee city of Indianapolis filed its motion to instruct the jury in its favor, and appellee Indianapolis Light and Heat Company filed its motion to the same effect. The appellant then dismissed the action as to defendant Alley. Each of the motions to instruct the jury was submitted to, and sustained by, the court, and thereupon the court instructed the jury to return a verdict in favor of each of the appellees, which the jury did, and the court rendered judgment in favor of each appellee, and against the appellant. The appellant filed his motion for a new trial, which was overruled, to which ruling of the court the appellant excepted, and now prosecutes this appeal. Overrul-

ing appellant's motion for a new trial is the only error relied upon for reversal.

The substance of so much of the complaint as is necessary for this decision is as follows: The defendant Alley for a long time prior to July 4, 1913, was excavating sand and gravel from the bed of Fall creek, a stream running through the city of Indianapolis, Indiana, at a point where Thirty-fourth street of said city, if extended, would cross the stream; that said city as such had full charge, control and supervision of said stream within the limits of said city. The appellee Indianapolis Light and Heat Company was engaged in furnishing to the citizens of said city an electric current generated within the city. On and prior to said July 4, 1913, said Alley, as a means of excavating sand and gravel from the bed of said creek, with the consent, approval and acquiescence of said city in its control and supervision of said stream, had constructed and was then maintaining and operating at said point on said creek certain buildings, boats, buckets, cables, masts, framework, wires and machinery of the sort that is commonly described as a gravel boat or gravel bucket outfit; that as a part thereof said Alley operated, with the consent, approval and acquiescence of said city, a barge or house boat consisting of a boat with an ordinary hull and a superstructure or small house built thereon, and in the center thereof. Said boat had a platform running around the outside of said superstructure about five or six feet wide at the ends of said boat. With the consent, approval and acquiescence of said city, said Alley had kept said boat moored in the waters of said creek at the above point, with the north end of the boat moored near to the

bank of said creek and the south end swinging loose, all of which was well known to said city. Prior to July 4, 1913, said Alley had entered into a contract with appellee Light and Heat Company to deliver him electricity from its plant and wires in said city, and said appellee Light and Heat Company had extended its wires carrying the electric fluid generated by it over and upon the boat, and had voluntarily undertaken to deliver along and over its wires the current of such electricity under its direction, supervision and control, and had full knowledge of the uses to which said electric current was to be placed, and the management, distribution and control of it, and said appellees knew, or could have known, that said electric current would be highly dangerous to life and safety of any person coming in contact with the wires through which it was conveyed where such wires were not properly insulated or covered and protected. Said current was a subtle and highly dangerous commodity under the most favorable conditions and when guarded with the utmost care. Numerous citizens of said city resorted to said point in said stream as a bathing resort and swimming hole, and appellees well knew at said date, and long prior thereto, that such place was resorted to by men, women, boys and girls in that vicinity as a bathing place, and that it was so used with the consent, approval and acquiescence of said city; appellees, each of them, knew, or could have known, that those engaged in bathing or swimming in said creek were induced and encouraged by the presence of said boat and the ready access thereto to use the platform thereof as a resting place or a place from which to dive into the waters of said stream, and they knew, or could have known, at said



time, because of the advancing heat of the summer, that many persons would be attracted to said place for the purposes aforesaid, and to the platform of the boat aforesaid for resting and diving. *That with such knowledge said Alley did prior to said July 4, 1913, wrongfully and unlawfully place or cause to be placed by his servants, and employes, acting for and on behalf of said defendant Alley, and in the line of their duty, on and around the outer edge of said boat and on the platform thereof above described, a wire then and there retained and held fast with staples in such a manner that the same could not be seen by a person in the water near said boat, and which wire was wrongfully and unlawfully placed by said Alley, or by his agents or employes at the time acting for and on his behalf, in the line of their duty at his direction for the sole purpose of having the same wrongfully and unlawfully charged with electricity from the current so furnished as aforesaid, in such a manner that when any person should touch the said wire he would receive an electric shock from the current conveyed by said wire. That said wire was so placed by said Alley and so ordered placed by him with a malicious aforethought, and with full intention to injure and maim any such person that might come in contact with it, wholly without regard for the possible injury which might be inflicted upon such person; and, with full knowledge of the presence of said wire so charged as aforesaid, said Alley wrongfully and wilfully suffered and permitted said wire to remain in said condition with such wrongful, unlawful and wilful purpose as aforesaid, and some time prior to July 4, 1913, caused said wire to be connected with the wires previously run upon said boat, charged as*

aforesaid, and upon said July 4, knowingly, wrongfully and unlawfully permitted said wire to carry a current of electricity so as aforesaid procured, and the said city knew, or by the exercise of reasonable care would have known, of the electric current being conveyed through said wire, but negligently and carelessly suffered the same to remain upon said boat, and negligently and carelessly permitted those in use of said stream to be endangered by the presence of said wire, and negligently and carelessly neglected to warn or guard the bathers in said stream; and appellee Light and Heat Company knew of the presence of the wire and the uses to which it was being put, but carelessly and negligently continued to furnish to said defendant Alley its electric current for such wrongful and unlawful use, and negligently and carelessly, with full knowledge of such use, suffered and permitted said current to flow through such wire in sufficient current to endanger the lives of those coming in contact with it, while it knew, or by the exercise of reasonable care could have known, that the bathers in said stream and those using the waters thereof would be in danger of their lives by the unguarded and unprotected electricity furnished by it and passing through such wires. That each of appellees knew of the presence of such boat and electricity in sufficient quantities to maim or kill one coming in contact therewith, and failed wholly to give notice of such electric fluid on said boat. Appellant's minor son, Earl Caldwell, was eighteen years of age, in good health, sound of mind and body, and earning the sum of \$50 per month, which was paid to the appellant, his father, the son not being able to take care of it and the son being a member of appellant's family. While so

bathing, without any knowledge of the negligent and careless acts of said Alley and his codefendants, and of the location and existence of the wire aforesaid, which was then and there negligently and carelessly suffered and allowed by said defendants to be fully charged with electric current by the said Light and Heat Company, and without any notice whatever or warning, said decedent climbed upon said boat and placed his body upon the edge thereof, and as he placed his body upon the edge thereof came in contact with the wire aforesaid, and thereupon received a shock of such force and effect as to kill him. There is a prayer for damages in the sum of \$10,000.

The appellees each contend that no question is presented on appeal with reference to the respective peremptory instructions, as no exception was taken

1. to the giving thereof. It appears, however, by the record that the bill of exceptions containing such instructions, duly signed by the trial judge, was presented and filed within the time given for filing bills of exceptions. Without deciding whether such bill was included in the praecipe of the appellant on account of not being filed until after the praecipe was filed, we hold that there was a good-faith effort to comply with the rules of the court. Ignoring any technicalities, the case will be decided upon its merits.

In this case, if the evidence upon any issue was insufficient in law to sustain a verdict in favor of the appellant, it was not only proper, but it was the

2. duty of the court to direct a verdict upon such issue against him. *Beaning v. South Bend Electric Co.* (1910), 45 Ind. App. 261, 90 N. E. 786; *Westfall v. Wait* (1905), 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788; *Borg v. Larson* (1916), 60 Ind. App.

514, 111 N. E. 201; *Williams v. Pittsburgh, etc., R. Co.* (1918), 68 Ind. App. 93, 120 N. E. 46. The case of *Beaning v. South Bend Electric Co., supra*, holds that, if there is any evidence to sustain the verdict, no matter what its weight or character, nor how much it may apparently be overborne by more convincing evidence conflicting therewith, the decision of the issue must be submitted to the jury, citing *Pennsylvania Co. v. McCormack* (1892), 131 Ind. 250, 30 N. E. 27; *Jacobs v. Jolley* (1902), 29 Ind. App. 25, 62 N. E. 1028. It is undisputed in the evidence that appellee Light and Heat Company installed the motor upon the houseboat of appellee Alley, and connected its electric wires therewith through which it was furnishing current to appellee Alley. It does not appear by the evidence, however, that the electric appliances, wires, etc., other than the motor, that were upon the houseboat were installed by said appellee Light and Heat Company. It does not appear by the evidence that the said appellee Light and Heat Company placed a wire around the edge of the boat, the contact with which resulted in the death of the appellant's decedent, and it appears by the undisputed evidence that said appellee had no knowledge whatever of the existence of such wire. It is not alleged in the complaint that said appellee Light and Heat Company placed such wire around the edge of the boat, but, on the contrary, it is averred that the said Alley placed, or caused to be placed, on and around the outer edge of the boat the wire which produced the injury and death of appellant's decedent, and that it could not be seen by a person in the water near the boat, and that it was wrongfully and unlawfully placed for the sole purpose of having it charged with

electricity in such a manner that when any person should touch the wire such person would receive an electric shock from the current conveyed by such wire, and that it was done by said Alley with malice aforethought, and with the intention to injure and maim any person who might come in contact with it. There is no averment in the complaint and no evidence as to how long such wires had been around the edge of the boat and used to carry an electric current. As far as appears by averment or proof, it may have been so placed immediately before the accident.

3. It has been repeatedly held that where the furnisher of electricity supplies the same to the customer, first through its own wires, and then through the wires owned and maintained by such customer, and over which the furnisher had no supervision or control, and an injury results by reason of the negligent manner in which the customer's wires are equipped and maintained, the party who merely sells the current is not liable. *Princeton Light, etc., Co. v. Ballard* (1915), 59 Ind. App. 345, 109 N. E. 405; *Minneapolis General Elec. Co. v. Cronon* (1908), 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816. The appellant contends that one installing an electric plant and supplying the current is charged with the duty of inspecting and discovering defects, and under this proposition states that appellee Light and Heat Company furnished all the wire and material used in the boat, and installed it, but never inspected it. This statement is not borne out by the evidence. Authorities cited are *Thomas v. Maysville Gas Co.* (1900), 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 145; *Lewis' Admr. v. Bowling Green Gaslight Co.* (1909), 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169;

*Mitchell v. Raleigh Electric Co.* (1901), 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. 735; *Abrams v. Seattle* (1910), 60 Wash. 356, 111 Pac. 168, 140 Am. St. 916. In the first three of these cases the defendant was furnishing its current to wires that were stretched over a street or highway, and in the last the defect was not in the wiring in the house, but outside, and resulted from uninsulated wires striking together as the wind swung them. If these elements do not distinguish them, then they are certainly against the great weight of authority, and certainly do not state the law of Indiana, as decided in *Princeton Light, etc., Co. v. Ballard, supra*. There was no error in directing the verdict as to appellee Indianapolis Light and Heat Company.

The appellant contends that appellee city of Indianapolis, by §§8961, 8729 Burns 1914, Acts 1905 p. 219, Acts 1909 p. 238, had full power and control over Fall creek, and that appellee Light and Heat Company had no right upon the waters or boats upon such waters of said stream other than as granted or permitted by statute or the ordinance of the city. This argument applies, of course, with equal force to defendant Alley. It is apparent from reading the sections mentioned that they are public improvement sections, and can have no application to the facts in this case. The kind of supervision that appellant contends should have been exercised in this case is by virtue of §8964 Burns 1914, Acts 1905 p. 383, which makes no mention of watercourses, and gives no authority over them, except, impliedly, when they are in public places. Defendant Alley occupied this stream by a lease from the owner, Horace McKay, and later by his heirs, of twenty-three acres of land covering both

sides of the stream where the barge was  
4. located. Appellant says that the city in its control of the stream had established a bathing and swimming place at the point wherein the boat was suffered and permitted to float at its mooring, but there is no evidence of such an action on the part of the city. By the averments of the complaint, the injury was the result of the wilful and malicious act of defendant Alley in placing the wire around the boat, and connecting it with the current, but of this misconduct appellee city had no notice whatever, and, it not being shown how long the wire had been so placed as aforesaid, it cannot be charged with

5. constructive notice. Even if at the time of the injury it had jurisdiction of the stream for any purpose, it cannot be charged with an injury that resulted from a dangerous wire, the existence of which it had no notice. *City of Evansville v. Senhenn* (1898), 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. B. A. 728, 68 Am. St. 218. There was no error in directing the verdict as to appellee city of Indianapolis.

Appellant complains that the court erred in refusing to require witness Lewis B. Mitchell to answer questions propounded to him, such witness hav-

6. ing refused to answer for the reason that his disclosures might tend to incriminate him. At said time the witness was under joint indictment with defendant Alley, for the offense that resulted in the injury involved in this action. Appellant failed to make any statement of what he expected to prove by said witness, and we are therefore unable to say that such ruling of the court was harmful to appellant, even if erroneous. *Jordan v. D'Heur* (1880), 71 Ind.

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199; *Hitz v. Warner* (1911), 47 Ind. App. 612, 93 N. E. 1005. We find no available error. The judgment is affirmed.

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SCOTTISH UNION AND NATIONAL INSURANCE COMPANY v.  
B. E. LINKENHELT AND COMPANY, INCORPORATED.

[No. 9,548. Filed December 31, 1918. Rehearing denied May 29, 1919.]

1. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer.**—Sustaining a demurrer to a paragraph of answer was harmless, where proof of the facts alleged therein was admissible under the general denial, and the record shows that evidence pertinent to the issue alleged was in fact admitted and that the jury was properly instructed with reference thereto. p. 326.
2. **APPEAL.—Review.—Weight of Evidence.**—The court on appeal will not weigh the evidence. p. 327.
3. **APPEAL.—Review.—Verdict.—Evidence.—Inferences.**—In determining the sufficiency of the evidence on appeal, every inference reasonably deducible therefrom will be indulged to support the verdict. p. 327.
4. **EVIDENCE.—Inferences.—Force and Effect.**—An inference, when authorized and drawn, has the same force and effect as a proved fact, and, in connection with the other facts established, may authorize a further or additional inference or inferences. p. 327.
5. **INSURANCE.—Tornado Insurance.—Action.—Pleading.—Condition Precedent.—Right to Repair.**—Where a tornado policy provided that the insurer reserved the right, if so elected, to repair, rebuild, or replace any property damaged or destroyed, the insurer, in order to avail itself of the defense that insured, by repairing the damaged property, breached the policy, must plead an election to exercise an option to repair, or facts excusing the failure to elect, since such election is a condition precedent to insurer's right to repair. p. 328.
6. **APPEAL.—Review.—Refusal of Instructions.—Repetition.**—Where, on a number of issues in the case, defendant tendered several instructions which were so nearly alike that the giving of all of those requested on any one subject might have resulted in a repetition harmful to plaintiff, but as to each issue the court



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gave at least one of the instructions tendered thereon, defendant was not prejudiced by the refusal of the remainder of the requested instructions. p. 330.

7. **APPEAL.—Waiver of Error.—Instructions.—**Error, if any, in the giving of an instruction relating to the measure of damages is waived by appellant's failure to assert on appeal that the damages awarded are excessive. p. 330.
8. **APPEAL.—Review.—Evidence.—Motion to Strike Out.—Necessity of Objections.—**Where a witness was permitted to testify without objection, the overruling of a motion to strike out the testimony presents no question for review on appeal. p. 330.
9. **INSURANCE.—Tornado Insurance.—Action on Policy.—Evidence.—Velocity of Wind.—Competency.—**In an action on a tornado policy, evidence of the velocity of the wind at about the hour of the damage to plaintiff's property at a point three and one-half miles from the place where plaintiff's property was located was properly admitted, the distance of the witness from plaintiff's property bearing on the weight of his testimony rather than on its competency. p. 331.
10. **APPEAL.—Review.—Evidence.—Waiver of Error.—**Whether evidence relating solely to the question of damages was erroneously admitted will not be considered on appeal, in the absence of any contention by appellant that the amount of recovery is excessive. p. 331.
11. **INSURANCE.—Tornado Insurance.—Action on Policy.—Verdict.—Answers to Interrogatories.—**In an action on a tornado policy, involving the question whether there was a windstorm within the terms of the policy at the time of damage to plaintiff's property, defendant's motion for judgment on answers to interrogatories showing that the wind blowing at the time insured's property was damaged was a usual wind at that season of the year in the locality in question, and that wind of much greater velocity at such time of the year was of frequent occurrence, was properly overruled, where the general verdict was for plaintiff and such answers were nullified by answers to other interrogatories finding that the wind attained velocity greater than twenty-eight to thirty miles per hour, and that a wind of that velocity was unusual. pp. 331, 332.
12. **INSURANCE.—Tornado Insurance.—Construction of Policy.—Windstorm.—**A windstorm, within the terms of an insurance policy indemnifying insured against loss or damage to property by windstorm, cyclone or tornado, takes its meaning from the words "tornado" and "cyclone," with which it is associated, and should be construed as something more than an ordinary gust of

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wind, no matter how prolonged, and, although it need not have either the twirling or whirling features which usually accompany tornadoes or cyclones, it must assume the aspect of a storm. p. 331.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action by B. E. Linkenhelt and Company, Incorporated, against the Scottish Union and National Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

*Burke G. Slaymaker*, for appellant.

*Martindale & Martindale*, for appellee.

HOTTEL, J.—This is an action by appellee to recover on an insurance policy in which appellant promised to indemnify appellee against loss or damage to certain of its property by windstorm, cyclone or tornado.

Fifty-six propositions are stated under appellant's points and authorities, of which the first challenges the action of the circuit court in sustaining a demurrer to appellant's second paragraph of answer.

This answer set up, by way of defense, a provision in the policy to the effect that "this company shall not be liable for any loss or damage caused by

1. hail, whether driven by wind or not, snowstorms, frost," etc. The memorandum filed with the demurrer shows that this defense was challenged on the ground that it was an argumentative denial, and that proof of the facts alleged therein was admissible under the general denial. The demurrer was evidently sustained on this theory, and, as the record shows that evidence pertinent to such issue was in fact admitted, and that the jury was properly instructed with reference thereto, it follows

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that no harm could have resulted from the ruling in question.

Appellant's propositions Nos. 2 to 33, inclusive, are directed to that ground of the motion for a new trial which challenges the verdict of the jury

2. as not being sustained by the evidence, and, subject to the exception hereinafter indicated, they may be disposed of through an application

3. of rules of law so well established that no citation of authority is necessary for their support, viz.: (1) That an appellate tribunal will not weigh the evidence; and (2) that every inference reasonably deducible therefrom will be indulged to support the verdict of the jury. As pertinent to the questions presented by some of appellant's propositions we should add, in this connection, that an inference, when authorized and drawn, has the same force

4. and effect as a proved fact, and, in connection with the other facts established, may authorize a further or additional inference or inferences. *Indian Creek Coal, etc., Co. v. Calvert* (1918), 68 Ind. App. 474, 119 N. E. 525, 120 N. E. 709; *Public Savings Ins. Co. v. Greenwald* (1918), 68 Ind. App. 609, 118 N. E. 556, 121 N. E. 47.

The evidence as a whole is very unsatisfactory, and presents a situation in which the circuit court might readily have sustained the motion for a new trial on the ground stated, but, as the record comes to this court, we have no such power. *Oilar v. Oilar* (1919), 188 Ind. 125, 120 N. E. 705, 706; *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462, 469, 34 N. E. 227.

The exception above referred to, in discussing the sufficiency of the evidence to sustain the verdict, is found in appellant's contention that appellee is

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affirmatively shown to have breached the terms of the insurance contract, and is therefore not entitled to recover. This contention rests on provisions of the policy to the effect: (1) that: "This company (appellant) reserves the right, if it so elect, to take all or any part of the articles damaged at their ascertained or appraised value; also to repair, rebuild or replace any property damaged or destroyed;" and (2) that "the insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described."

The evidence shows that before proof of loss was made, appellee repaired the building which had been damaged by the alleged windstorm, and appel-

5. lant insists that, as this act prevented an exercise of its option to repair and restore said building, it amounted to a breach of the contract between the parties. In answer to this argument, appellee directs attention to a further provision in the policy requiring that, "In the event of loss, the insured shall forthwith protect the property from further damage," and asserts that the condition of the building was such as to require immediate repair in order to avoid further damage to the merchandise within. It is also shown that immediately after the storm in question appellant sent a representative to examine and inspect the damaged building and merchandise; that he left without taking steps to repair the property and without indicating an intention or desire so to do, and that appellee then made repairs in order to avoid further loss and damage. In our view of the case, there is no occasion here to discuss the merits of the question which is involved in the respective conditions of the policy above set out. At

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most, the alleged breach of contract relied on by appellant would affect its rights only in case it elected to repair the damaged property, and there is no pleading in the case which shows an exercise of the option to repair, or steps taken to that end, or an intention or desire to exercise such option but for the act of appellee. The right to repair is expressly conditioned on an election by appellant and such election was therefore a condition precedent, and should have been pleaded. *Magic Packing Co. v. Stone-Ordean, etc., Co.* (1902), 158 Ind. 538, 541, 64 N. E. 11; *Union Central Life Ins. Co. v. Jones* (1897), 17 Ind. App. 592, 601, 47 N. E. 342.

It is true that an insured might be guilty of acts and conduct which would prevent or render futile an election on the part of the company, but in such a case the facts relied on as excusing the failure to elect should be set forth in the pleading. *Magic Packing Co. v. Stone-Ordean, etc., Co.*, *supra*, 542; *Plowman v. Shidler* (1871), 36 Ind. 484, 490.

In the present case, there is not only a failure to present such issue in a proper pleading, but there is also an absence of evidence tending to show an election to repair or an intention or desire to exercise the option to that effect. On the contrary, appellant denied any liability under the policy, and its present claim does not seem to have entered into that denial, as originally stated. The condition of the pleadings, and of the evidence pertinent thereto, serves to distinguish this case from those which are cited and relied on by appellant.

Appellant's propositions Nos. 34 to 48, respectively, challenge the action of the trial court in refusing to

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give certain instructions tendered by appellant.

6. It is unnecessary to burden this opinion by setting out or discussing the merits of any of these instructions. It is sufficient to say that, on the issues to which they relate, appellant tendered two or more instructions which were substantially alike, or so nearly so that the giving of all of those tendered on any one subject might have resulted in a repetition prejudicial to the rights of appellee. In every instance, the court gave at least one of the instructions tendered on a particular issue, and, when the instructions which were refused are considered in the light of those which were given, it is evident that appellant's rights were not prejudiced by such refusal. *Yetter v. Yetter* (1916), 185 Ind. 206, 208, 110 N. E. 195; *Daywitt v. Daywitt* (1917), 63 Ind. App. 444, 450, 114 N. E. 694.

Appellant's proposition No. 49 is directed to instruction No. 5 given by the trial court on its own motion. This instruction, however, relates to

7. the measure of damages, and the error therein, if any, has been waived by appellant's failure to assert, in this court, that the award of the jury is excessive. *Washburn-Crosby Co. v. Cook* (1919), 70 Ind. App. 463, 120 N. E. 434, 437, and cases there collected.

The next two propositions stated in appellant's brief relate to the admission of evidence. The first has reference to the testimony of the witness

8. Melvin Green that, at about the hour of the damage to appellee's property, he was driving along a road about three and one-half miles east of the city of Plymouth, in which appellee's property is situated, and that "the wind was blowing so hard I could not get across the railroad; the sleigh went

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over.” The record discloses no objection to the admission of this evidence, but shows that after its admission, appellant moved to strike out “what took place three and one-half miles east of Plymouth.” This motion presents no question for review since there is no error in refusing to strike out testimony which is admitted without objection. *Eckman v. Funderburg* (1915), 183 Ind. 208, 213, 108 N. E. 577;

*Regina Co. v. Galloway* (1912), 50 Ind. App. 92,

9. 93, 98 N. E. 81. Furthermore, the time and place of the experience narrated by the witness would have a bearing on the weight of his testimony, rather than on its competency, and, under the circumstances, the evidence was properly received.

The second objection to the admission of evidence relates to the testimony of one of appellee’s officers concerning the cost of the repairs which were

10. made on the damaged building, but, in the absence of any contention on the part of appellant that the amount of recovery is excessive, there is no occasion to consider this objection in detail, since the evidence related solely to the question of damages. *Peabody-Alwert Coal Co. v. Yandell* (1913), 179 Ind. 222, 229, 100 N. E. 758.

Finally, it is contended that appellant’s motion for judgment on the answers to interrogatories returned by the jury should have been sustained. This

11. contention rests on the answers to interrogatories Nos. 12 and 19, to the effect, respectively, that the wind which was blowing at the time

12. appellee’s roof collapsed was a usual wind in the winter season in Marshall county, and that a wind of greater velocity than that which was blowing on said occasion was of frequent occurrence in

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Marshall county in the winter season. As stated in *Jordan v. Iowa, etc., Ins. Co.* (1911), 151 Iowa 73, 77, 130 N. W. 177, Ann. Cas. 1913A 266, a windstorm, within the meaning of an insurance policy such as the present, "should be construed as something more than an ordinary gust of wind, no matter how prolonged; and it takes its meaning measurably at least from the other words with which it is associated, to wit, tornado and cyclone. However, it need not have either the cyclonic or the twirling or whirling features which usually accompany tornadoes or cyclones, but it must be more than an ordinary current of air no matter how long continued. In other words, it must assume the aspect of a storm, i. e., an outburst of tumultuous force." The general verdict of the jury

necessarily finds the existence of a "wind-  
11. storm," as above defined, and that finding is at variance with the answers to interrogatories which tend to show only an ordinary or usual wind, entirely seasonable in character. These answers, however, are nullified by the answers to interrogatories Nos. 14 and 15, to the effect that at the time of the injury to appellee's property the wind had attained a velocity greater than twenty-eight to thirty miles per hour, and that a wind of that velocity was a high or unusual wind for the winter season in Marshall county. It thus appears that the answers relied on by appellant, in so far as they tend to contradict the general verdict, are destroyed by other answers returned by the jury, and the motion for judgment thereon was therefore properly overruled. *Wise v. Cleveland, etc., R. Co.* (1915), 183 Ind. 484, 487, 108 N. E. 369; *Traylor v. McCormick* (1917), 63 Ind. App.



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695, 698, 115 N. E. 346; *Williams v. Lowe* (1916), 62 Ind. App. 357, 364, 113 N. E. 471.

No reversible error appearing, the judgment of the trial court is affirmed.

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PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. BAUGHN.

[No. 9,808. Filed June 3, 1919.]

1. PLEADING.—*Demurrer to Complaint.*—*Waiver of Objections.*—*Failure to Point Out in Memorandum.*—Under §344, cl. 6, Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, objections to the sufficiency of the complaint not stated in the memorandum accompanying the demurrer are waived. p. 334.
2. PLEADING.—*Demurrer to Complaint.*—*Memorandum.*—*Sufficiency.*—An objection to the sufficiency of the complaint, set out in the memorandum accompanying the demurrer, "that no facts are alleged to show or showing the defendant guilty of actionable negligence," is too general and indefinite to present any question. p. 335.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Action by William J. Baughn against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*G. E. Ross*, for appellant.

*Macey, Nichols & Bales* and *Charles E. Schwartz*, for appellee.

McMAHAN, J.—The appellee brought this action to recover the value of a mare which it is alleged was struck and killed by one of appellant's locomotives by reason of the negligence of appellant in failing to fence securely its right of way.

The complaint alleged that appellant operated and controlled a certain railway in Randolph county, Indiana, and that it failed and neglected to construct and maintain a proper fence to restrain horses and cattle from straying on its right of way; that a mare owned by appellee, by reason of the failure of appellant to fence its right of way, strayed upon appellant's right of way at a place where it was not fenced, and that appellant negligently ran a locomotive and train of cars against said mare, killing the same, all of which was without appellee's fault.

Appellant filed a demurrer to the complaint for want of facts, which was overruled and exceptions saved. Answer of general denial was filed, and a trial by jury resulted in a verdict and judgment for appellee. Appellant filed a motion for a new trial for the reasons that the verdict is not sustained by sufficient evidence, is contrary to law, and for the giving of certain instructions.

Appellant contends that the complaint is bad, and that the demurrer to it should have been sustained because it is not alleged: (1) That the appellant owned or operated the locomotive and train of cars which it is alleged ran against and killed the mare; (2) that it is not alleged that the servants of appellant who ran the locomotive and train were at the time in appellant's employ; (3) that it is not alleged that the mare which was killed entered upon appellant's right of way in Randolph county where the fence was insufficient; and (4) that it is not alleged that the mare was killed in Randolph county. None of these objections to the complaint were stated

1. in the memorandum which was filed with the demurrer and by virtue of §344, cl. 6, Burns

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1914, Acts 1911 p. 415, are waived. The first  
2. objection to the complaint set out in the memorandum filed with the demurrer is that: "No facts are alleged to show or showing the defendant guilty of actionable negligence." This is too general and indefinite to present any question. The purpose of requiring the demurring party to file a memorandum stating wherein the pleading is insufficient for want of facts is so that the trial court will have the particular objection in mind and act advisedly when ruling upon the demurrer. The day of filing a general demurrer to a pleading is a thing of the past in Indiana, and the filing of a memorandum which is as vague and indefinite as the general demurrer avails nothing. We know of no good reason why a party filing a demurrer to a pleading should not be as specific in pointing out the objections to the trial court as is done on appeal. We see no objection to the complaint. The demurrer was properly overruled.

Appellant contends that the verdict is not sustained by sufficient evidence in the following particulars: That there is no evidence: (1) That said mare was struck by, or came in contact with, a locomotive or car on appellant's railroad; (2) that said mare was struck or killed in Randolph county, Indiana; (3) that said mare was struck by, or came in contact with, a locomotive or car owned or operated by appellant; (4) that said mare was negligently run against and killed by a locomotive and train of cars operated and managed by the servants and agents of said defendant.

We have examined the evidence and find that there is evidence on every material allegation of the complaint sufficient to sustain the verdict.

Complaint is made of the first, second, third and seventh instructions given by the court to the jury.

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By instruction No. 1 the court informed the jury as to the nature of the complaint and answer, and that the appellee had the burden of proving every material allegation of the complaint by a fair preponderance of the evidence. By instruction No. 2 the court correctly instructed the jury as to the law requiring railroads to fence their right of way. Instruction No. 3 informed the jury that, while appellee must prove his case by a preponderance of the evidence, that proof need not be by direct evidence of persons who saw the occurrence sought to be proved and that facts might be proved by circumstantial evidence. By instruction No. 7 the jury was instructed as to the duty of a railroad to construct fences and to keep them in repair.

Each of the instructions were applicable to the issues, were correct as to form, and there was no error in the giving of any of them. The motion for a new trial was properly overruled.

Judgment affirmed.

Nichols, P. J., not participating.

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McMILLAN, ADMINISTRATOR, v. PLYMOUTH ELECTRIC  
LIGHT AND POWER COMPANY.

[No. 9,827. Filed June 3, 1919.]

1. *APPEAL.—Record.—Bill of Exceptions.—Filing.*—A purported bill of exceptions embodied in the transcript cannot be considered a part of the record, unless it appears that it was duly filed, which must be shown either by an order-book entry or by the certificate of the clerk of the trial court, and that such filing was made during the term at which the motion for a new trial was overruled, or within a time given beyond such term for that purpose. p. 338.

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2. EXCEPTIONS, BILL OF.—*Requisites.—Certificate of Judge.*—The longhand report of the evidence alone does not constitute a bill of exceptions, the certificate of the trial judge being required to make it a completed bill. p. 339.
3. EXCEPTIONS, BILL OF.—*Filing.—How Shown.—Clerk's Certificate.—Sufficiency.*—The certificate of the clerk merely reciting that the transcript contains the longhand report of the evidence as filed in his office by the court reporter is not sufficient to show that the bill of exceptions containing the evidence was filed. p. 340.
4. APPEAL.—*Record.—Bill of Exceptions.—Filing.—How Shown.*—The filing of a bill of exceptions cannot be shown on appeal by the file mark of the clerk thereon alone. p. 340.
5. EXCEPTIONS, BILL OF.—*Incorporating in Record.—Praecipe.*—A written praecipe addressed to the clerk directing him to make out a complete transcript of all the pleadings, entries and orders made and entered of record in the cause, did not include a direction to include a bill of exceptions containing the evidence. pp. 340, 341.
6. PLEADING.—*Definition.—Scope.*—Pleadings in a cause are the formal statements by the parties of their respective claims and defenses, and in the broadest sense include all proceedings from the complaint until issue is joined. p. 341.
7. MOTIONS.—*Order.*—An order of court is a judgment or conclusion of the court on any motion or proceeding by which affirmative relief is granted or relief denied. p. 341.
8. COURTS.—*Entry.*—An entry, as applied to judicial proceedings is a statement of a conclusion reached by the court, or an act done during the progress of a cause, which is spread of record, and designed to furnish incontestable evidence of the matter stated. p. 341.
9. APPEAL.—*Record.—Praecipe.*—Where a written praecipe for a transcript is filed calling for less than the entire record, only such papers and entries as are mentioned therein are properly a part of the record on appeal. p. 341.
10. EXCEPTIONS, BILL OF.—*Requisites.—Identification.—Statement.*—While it is not necessary that a bill of exceptions containing the evidence shall have any particular form of introduction, yet it should be preceded by a statement sufficient to identify it as a bill of exceptions. p. 342.
11. APPEAL.—*Questions Reviewable.—Evidence.—Bill of Exceptions.*—In order to have the evidence considered on appeal, the bill of exceptions in the record must show that it contains all the evidence. p. 342.
12. APPEAL.—*Questions Reviewable.—Assignments of Error.*—Where the only error assigned on appeal is the action of the

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court in overruling the motion for a new trial, and the only grounds therefor alleged therein require a consideration of the evidence, which is not in the record, no question is presented for review. p. 342.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action by Walter J. McMillan, administrator of the estate of James McMillan and Company against the Plymouth Electric Light and Power Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Gallagher & Messner, Adam E. Wise and Messner & Higgins*, for appellant.

*Harley A. Logan*, for appellee.

BATMAN, C. J.—This is an action by appellant against appellee to foreclose a mechanic's lien, in which a judgment was rendered in favor of the latter against the former. The sole error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial, which is based solely on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law. It thus appears that the only questions which appellant seeks to present by this appeal require a consideration of the evidence.

Appellee asserts that the evidence is not in the record, and we will first direct our attention to a consideration of this contention, for, if it is well

1. taken, there is nothing presented for our determination. An inspection of the transcript filed in this court discloses that there is embodied therein what purports to be a bill of exceptions containing the evidence, but it does not follow from this that

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such bill is a part of the record. Certain other facts must appear before it can be so considered. Among other things, it must appear that it was duly filed. *Hoover v. Weesner* (1897), 147 Ind. 510, 45 N. E. 650, 46 N. E. 905. Such filing must be shown either by an order-book entry, or by the certificate of the clerk of the trial court. *Howe v. White* (1904), 162 Ind. 74, 69 N. E. 684; *Graves v. Jenkins* (1915), 58 Ind. App. 500, 108 N. E. 531. It must also appear that such filing was made during the term at which the motion for a new trial was overruled, or within a time given beyond such term for that purpose. *Bennett v. Root Furniture Co.* (1911), 176 Ind. 606, 96 N. E. 708; *Home Stove Co. v. Bishop* (1918), 67 Ind. App. 276, 119 N. E. 152. In the instant case the record fails to show a compliance with any of these requirements. It appears that the judgment from which this appeal is taken was rendered at the May term of the Marshall Circuit Court in the year 1916. Appellant filed a motion for a new trial in due time, which was overruled at the following September term of said court. The record fails to show that the alleged bill of exceptions was filed during said term, or that any time was given appellant beyond the expiration thereof for such purpose. In fact, the record does not show, by either of the recognized methods, that it was ever filed, there being no order-book entry to that effect in the transcript, and the clerk's certificate being silent in that regard. True, the clerk's certificate recites that the transcript contains "the longhand report of the evidence \* \* \* as filed in my office by Francis Karn, court reporter of said court," but it makes no reference to the filing of any bill of exceptions.

2.    tions. The longhand report of the evidence alone does not constitute a bill of exceptions.

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It requires the certificate of the trial judge to

3. make it a completed bill. Hence a certificate merely reciting that such longhand report was filed is not sufficient to show that the bill of exceptions was filed. *Hoffman v. Isler* (1912), 49 Ind. App. 284, 97 N. E. 188; *Fairbanks v. Warrum* (1914), 56 Ind. App. 337, 104 N. E. 983, 1141. We note that certain file marks of the clerk of the trial court appear on the back of various pages of the alleged bill of exceptions containing the evidence, some bearing a date prior and some bearing a date subsequent to the day on which the trial judge attached his certificate

4. thereto, but it is well settled that the filing of a bill of exceptions cannot be shown on appeal by the file mark of the clerk thereon alone. *Rector v. Druley* (1909), 172 Ind. 332, 88 N. E. 602. For the reasons stated we hold that the alleged bill of exceptions containing the evidence is not a part of the record.

But, aside from the question of filing, there is still another reason why such bill of exceptions cannot be considered as being a part of the record. It

5. appears that the transcript in question was prepared in pursuance of a written praecipe, which, after entitling the cause, is addressed to the clerk of the trial court in the following words: "You are directed to make out a complete transcript of all the pleadings, entries and orders made and entered of record in the above entitled cause." It will be observed that this praecipe does not call for a transcript of the entire record, but for only such portions thereof as are properly designated as pleadings, orders and entries. Pleadings in a cause are the



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formal statements by the parties of their respective claims and defenses. 21 R. C. L. 436; *Kilpatrick-Koch, etc., Co. v. Box* (1896), 13 Utah 494, 45 Pac. 629; *Paxton v. State* (1899), 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689. In its broadest sense, the word "pleadings" includes all proceedings from the complaint until issue is joined. 31 Cyc 46; *Merrill v. Pepperdine* (1893), 9 Ind. App. 416, 36 N. E. 921. An order of court has been defined as a judgment or conclusion of the court on any motion or proceeding by which affirmative relief is granted or relief is denied. 20 R. C. L. 512; 29 Cyc 1514; *Fisher v. McKeemie* (1914), 43 Okla. 577, 143 Pac. 850, Ann. Cas. 1917C 1039, and note. The word "entry," as applied to judicial proceedings, is a statement of a conclusion reached by the court, or an act done during the progress of a cause, which is spread of record, and designed to furnish incontestable evidence of the matter stated. 15 Cyc 1055; 1 Black, Judgments §106. It thus appears that the language used in said praecipe, even under a liberal construction, does not fairly include a bill of exceptions containing the evidence. Under the well-settled rule that, where a written praecipe for a transcript is filed, calling for less than the entire record, only such papers and entries as are mentioned in said praecipe are properly a part of the record on appeal, we cannot consider the alleged bill of exceptions in determining any question which appellant has sought to present. *King v. Hoover* (1914), 57 Ind. App. 558, 105 N. E. 172.

Appellee has directed our attention to the fact that the alleged bill of exceptions is not preceded by an

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introductory statement as to what it purports

10. to be, and that it fails to show that it contains all the evidence. In view of the conclusion we have already announced, it will suffice to say with reference to the first alleged defect that, while it is not necessary that a bill of exceptions containing the evidence shall have any particular form of introduction, yet it should be preceded by a statement sufficient to identify it as a bill of exceptions. *Huston v. Cosby* (1895), 14 Ind. App. 602, 41 N. E. 953; *Jenkins v. Wilson* (1895), 140 Ind. 544, 40 N. E. 39; *Knickerbocker Ice Co. v. Lewis* (1903), 160 Ind. 494,

11. 67 N. E. 188. As to the second alleged defect we need only say that it has been repeatedly held that, in order to have the evidence considered on appeal, the bill of exceptions in the record must show that it contains all the evidence. *Wagner v. Wagner* (1915), 183 Ind. 528, 109 N. E. 47.

It is also contended that appellant's brief does not comply with the rules, but under the circumstances it will suffice to state that this conten-

12. tion in part is well taken. In view of the fact that the only error assigned is the action of the court in overruling the motion for a new trial, and that the only grounds therefor alleged therein require a consideration of the evidence, which we have held is not in the record, there is nothing presented for our consideration. *Shull v. Dunten* (1916), 62 Ind. App. 602, 113 N. E. 381; *Fort Wayne, etc., Traction Co. v. Kumb* (1917), 64 Ind. App. 529, 116 N. E. 309. Under these circumstances the judgment must be affirmed.

Judgment affirmed.

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Nickerson v. Hoover, Admr.—70 Ind. App. 343.

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## NICKERSON ET AL. v. HOOVER, ADMINISTRATOR, ET AL.

[No. 9,829. Filed March 28, 1917. Rehearing denied June 29, 1917.  
Transfer denied June 3, 1919.]

1. DESCENT AND DISTRIBUTION.—*Heirs.*—In its strict legal or technical sense, the word heirs refers to those on whom the law casts the inheritance in the absence of a will. p. 350.
2. WILLS.—*Construction.—Use of Words.—Heirs.*—The word “heirs,” as used in a will may signify those who take by its terms. p. 350.
3. WILLS.—*Construction.—Technical Terms.—Testator’s Meaning.*—Where, by a proceeding within the rules that govern in such cases, the meaning that testator assigned to the term “heirs,” as used by him in an item of his will, has been clearly ascertained, effect must be given to it as so used, even though such meaning is different from its legal or technical meaning. p. 350.
4. WILLS.—*Construction.—Use of Words.*—In determining the sense in which a testator uses a term in his will, other portions of the instrument may be examined. p. 350.
5. WILLS.—*Construction.—Use of Words.—Extrinsic Circumstances.*—In determining the sense in which a testator used a word in his will, the court will look at the circumstances under which the will was made, as the state of testator’s family or his property, and the like. p. 350.
6. WILLS.—*Construction.—Heirs.*—The word “heir,” as used in an item of a will stipulating that testator’s daughter have thirty acres of land “provided she have heirs, if not, then at her death I wish,” her husband “to hold the same until his death if he survives her,” etc., *held* to have been used in the sense of “children,” in view of the fact that, wherever testator used the word “heirs” elsewhere in the will, he used it with the force and significance of children, and that, when the will was drawn, and at the time of testator’s death, the daughter had a number of heirs, using the term as referring to persons capable of inheriting from her at her decease. p. 350.
7. WILLS.—*Construction.—Devise.—Fee Simple.—Devise Over.—Vesting.*—Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of the death of such primary devisee without children or issue, the condition refers to a death without children or issue within the lifetime of the testator, and, if the primary devisee survives the testator he takes at the latter’s death an estate in fee simple. p. 352.

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8. *WILLS.—Construction.—Devise in General Terms.—Estate Created.*—Where a devise is in general terms, unaccompanied by words of inheritance or other language defining or indicating the quantity of estate to be taken by the devisee, only a life estate is thereby created. p. 353.
9. *WILLS.—Construction.—Devise of Land.—Creation of Life Estate.—Condition Precedent.*—Where testator's will devised thirty acres of land to his daughter "forever provided she have heirs, if not then at her death" providing a remainder over, the will created a life estate in the daughter capable, on the condition that she have children, of being enlarged into a fee, such condition being precedent rather than subsequent, as a condition precedent is an event, the happening or not happening of which causes a conditional estate to vest or be enlarged. pp. 353, 356.
10. *WILLS.—Construction.—Devise on Condition.—Intent of Testator.*—The rule that a condition annexed to a devise in fee respecting devisee's death without children or issue ordinarily refers to the period terminating with the death of the testator is one of construction only, and yields readily to the intent of the testator. p. 355.
11. *ADOPTION.—Adopted Child's Right of Inheritance.*—An adopted child has the right to inherit from the adopting parent any estate of which the latter dies the owner. p. 356.
12. *WILLS.—Construction.—Heirs.—Adopted Child.—"Have."*—Where an item of a will stipulated that testator's daughter "have thirty acres of ground \* \* \* forever provided she have heirs," the term "heirs" being used in the sense of children, *held* that, viewing the entire will in the light of surrounding circumstances, testator, by the phrase "provided she have heirs," meant provided children should be born to her, and the condition was not satisfied by the daughter's adoption of a child pursuant to §868 *et seq.* Burns 1914, §823 *et seq.* R. S. 1881, the word "have," as used in the provision that the daughter should have thirty acres meaning to possess or to acquire, and, as used in the proviso, meaning to bear. p. 357.
13. *APPEAL.—Review.—Scope.—Point not made in Original Brief.*—The court on appeal should not be required to consider a point not made in appellee's original brief. p. 362.

From Marion Probate Court; *Mahlon E. Bash*, Judge.

Petition for an order for the sale of realty by Charlie Hoover, administrator *de bonis non* with the

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will annexed, of the estate of Andrew Hoover, deceased, and others, against Cora May Nickerson and others. From a decree directing the sale of the land and a distribution of the proceeds as prayed, the defendants appeal. *Affirmed.*

*Harvey & Harvey, Elmer E. Stevenson and Thomas D. Stevenson*, for appellants.

*Kealing & Hugg, Enos W. Hoover and Smith, Remster, Hornbrook & Smith*, for appellees.

CALDWELL, J.—The following facts are disclosed by the record: November 25, 1863, Andrew Hoover died testate in Marion county, the owner of an estate therein, consisting of both real and personal property, and including a certain thirty-acre tract of land hereinafter described. June 1, 1859, he executed a will, which was changed somewhat, as hereinafter indicated, and re-executed February 13, 1862. The will after his decease was duly probated as re-executed. The parties agree that a proper construction of the will, and especially of the ninth item thereof, determines this appeal. That item is as follows:

“It is my will that Sarah J. Charles have thirty (30) acres of grounds described as follows, to-wit: A strip off of the south side of the north one-half of the northwest quarter of section twenty (20) township fifteen (15) range three (3) east and not included in the deed made to Jacob Hoover of fifty (50) acres on the north side of said half quarter section, be the same more or less, forever provided she have heirs, if not then at her death, I wish Jacob Charles to hold the same until his death if he survives her, and then I wish said land to be taken by my execu-

tors and disposed of as the ten acres of the south of my farm are to be divided as directed in this my will, excepting that I will that of the funds arising from said thirty (30) acres my executors shall pay Jacob Charles the sum of \$100.00 before dividing the same amongst other heirs.”

After the first execution of the will, and prior to its re-execution, the testator added to the ninth item, by interlineation, the provision:

“I wish Jacob Charles to hold the same until his death if he survives her and then.”

It will be observed that by the ninth item a direction found in some other part of the will with reference to disposing of a ten-acre tract was applied conditionally to the thirty acres also. The provisions of the will directing a disposition of the ten-acre tract, and which affect also the thirty-acre tract are found in the seventh and eighth items of the will, which are as follows:

“7th. The remaining strip of land on the south side of said farm ten (10) rods wide I will to be sold by my executors as soon as convenient and proper and so as to realize the best price in the judgment of said executors, and the funds arising therefrom, together with what may arise from the sale of certain thirty (30) acres of ground hereinafter given conditionally to S. Jane Charles, my daughter, to be equally divided between my heirs, Hannah Cossell, Mary A. Wright, Daniel Hoover and Alexander W. Hoover, excepting what of said sum or funds I have herein given to the heirs of George Hoover,

my son, hereinafter named, and to George, my son.

“8th. It is my will that of my grandchildren, the children of my son, George Hoover, and my son, George Hoover, have of said fund before dividing between the four heirs above named, the following sums, to wit: To George, my son, the sum of fifty (\$50.00) dollars, to George T. Hoover, my grandson, the sum of \$100.00 and to Erastus Hoover, my grandson, the sum of \$100.00, and should the thirty (30) acres above named ever be sold and divided as contemplated in the 7th item of this will, then the following named persons, my grandchildren, to have, before dividing with the four heirs named in item seven, each the sum of \$100.00 namely: George W. T. Hoover, above named, \$100.00, Erastus Hoover, above named, \$100.00, and Willie E. M. Hoover, my grandson, the sum of \$100.00, making to the two first named in all \$200.00 each, to the last named one the sum in all \$100.00, and to George Hoover, my son, \$50.00.”

Prior to the first execution of the will the following sons and daughters had been born to testator and his wife, Sarah Hoover: Carey S., Percy S., Jacob, Daniel and Alexander W. Hoover, Mary A. Wright, Hannah Cossell and Sarah J. Charles, the latter designated in the will also as S. Jane Charles. The widow and each of the children survived testator. Each of said children was married prior to the execution of the will, and to each, except Sarah J. Charles, children had been born, which children were living at the time of the execution of the will, at the time of its second execution, and also at the decease

of testator. Sarah J. Charles was born in 1829, married to Jacob Charles in 1850, and died in 1914. Jacob Charles died in 1890. After the decease of Andrew Hoover and the probate of his will Sarah J. Charles entered into possession of the thirty-acre tract of land, and continued in such possession until her decease, at which time she was about eighty-five years old. In 1911, by proceedings under the provisions of §868 *et seq.* Burns 1914, §833 *et seq.* R. S. 1881, the regularity of which are not questioned, she adopted appellant Cora May Nickerson, whose maiden name was Dell, as her child and heir. Cora May Nickerson was born in 1872, and in 1889 was married to her coappellant, Arthur S. Nickerson. Cora May Nickerson claims to be the owner of said tract as the heir of Sarah J. Charles by virtue of said adoption, and not otherwise. After the decease of Sarah J. Charles, appellee Charlie Hoover, as administrator *de bonis non* with the will annexed of the estate of Andrew Hoover, proceeding under the will as interpreted by him, filed a petition to procure an order for the sale of the thirty-acre tract of land and a distribution of the proceeds as contemplated by the seventh, eighth and ninth items of the will under certain circumstances. Cora May Nickerson and her husband were named as defendants. Other proper defendants were also named. The cause having been placed at issue, a trial by the court resulted in a decree directing the sale of the land and a distribution of the proceeds as prayed. Appellant Cora May Nickerson was decreed no relief other than the payment to her, as heir of Sarah J. Charles, of the \$100 legacy bequeathed to the husband of the latter by the ninth item of the will, Sarah J. Charles on the decease of her husband having inherited from him the right to such sum.



Error is assigned by Cora May Nickerson and her husband on the sustaining of a demurrer to certain answers filed by them, and to a cross-complaint filed by the former, and also on the overruling of their joint and several motion for a new trial by which they challenged the sufficiency of the evidence. The pleadings to which demurrers were sustained, and also the evidence, disclosed, among other things, that at the time of the execution of the will, the time of the decease of the testator, and at all times thereafter, there were nephews and nieces of Sarah J. Charles and also other of her relatives capable of inheriting from her, and also the facts respecting the adoption of Cora May Nickerson. The points made by appellants under the assignments of error based on said rulings present for our consideration two questions: First, by the ninth item of the will did Sarah J. Charles, at the death of testator, take a fee-simple estate in the lands involved? Second, if, by the terms of said item, Sarah J. Charles at the decease of the testator took a conditional fee or a fee on condition rather than a fee simple, did the existence of nephews and nieces and others capable of inheriting from her, or the fact of such adoption, fulfill the condition so that such estate less in quantity than an unqualified fee ripened into an absolute fee? In order that the judgment may be affirmed, both questions must be answered in the negative. We proceed to construe the ninth item of the will, and first as to the significance of the word "heirs" as used in connection with the devise to Sarah J. Charles.

In its strict legal or technical sense, such word has reference to those on whom the law casts the inherit-

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ance, in the absence of a will. *Granger v.*

1. *Granger* (1897), 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186. As used in a will, it may signify those who take by its terms.
2. *Eisman v. Poindexter* (1876), 52 Ind. 401; *Hoke v. Jackman* (1914), 182 Ind. 536, 107 N. E. 65. The testator in using such term in his will had a right to assign to it a meaning other than its technical meaning, as devisees, children, or the like. Where by proceeding within the rules that govern in such cases the meaning that testator assigned
3. to such term as used by him in the item under consideration has been clearly ascertained, effect must be given to it as so used, even though such meaning is different from its legal or technical meaning. *Ridgeway v. Lanphear* (1885), 99 Ind. 251. To determine the sense in which testator used such
4. term, other portions of the will may be examined. *Hoke v. Jackman, supra*. Also, "the court will look at the circumstances under
5. which the deviser makes his will, \* \* \* as the state of his property or his family, and the like." 2 Jarman, Wills (6th ed.) 771; *Skinner v. Spann* (1911), 175 Ind. 672, 93 N. E. 1061, 95 N. E. 243.

We proceed to examine other portions of the will: The word "heirs" is used five times in the will in addition to its use in the ninth item. Thus in

6. the third item there is a provision by which, subject to a life estate in the widow, a farm owned by testator is devised to "my heirs, Carey S. Hoover, Percy C. Hoover, and Jacob Hoover" each of whom was a child of testator. In the seventh item the term "my heirs" is used where the reference is to certain of his children. The seventh item contains

also the expression "the heirs of George Hoover." The eighth item discloses that by such phrase testator meant George Hoover's children. The word "heirs" is used twice in the eighth item, in each case plainly signifying testator's children. It is used in a like sense in the fourteenth item. From an examination of the entire will it seems to us apparent that the term "heirs," as used in connection with the devise to Sarah J. Charles, has the force and significance of children; that the ninth item should be interpreted as if it read that it was testator's will that Sarah J. Charles have the lands involved "forever if she have children, but that if she does not have children, then at her death," etc. Looking to the circumstances under which the will was written, we are confirmed in this conclusion. Thus at the time when the will was executed, and also at the decease of testator, Sarah J. Charles had a number of heirs, using the term in its sense as referring to persons capable of inheriting from her at her decease. There was no probability that heirs would fail her, assigning to the term its meaning aforesaid. This being true, we are at a loss to discover any reason why the testator should encumber the devise to her with the condition indicated by the language used, if to the word "heirs" must be assigned its technical meaning. Moreover, prior to the execution of the will, children had been born to each of testator's sons and daughters other than Sarah J. Charles, which children were living when the will was made and also at testator's death. He devised or bequeathed to each son and daughter other than Sarah J. Charles an absolute estate or interest in the property given without limitation, qualification, or condition. Sarah J. Charles had been

married a number of years, but no children had been born to her. The absence of children was the sole distinction between her status and that of her brothers and sisters. It is therefore reasonable to conclude that such distinction in status formed the basis of the condition annexed to the estate devised to Sarah J. Charles, and omitted from provisions made in favor of her brothers and sisters, and therefore that the testator used the term "heirs" as signifying children.

On the assumption that the word "heirs" should be interpreted as indicated, appellant argues that nevertheless Sarah J. Charles at the death of tes-

7. tator took an estate in fee simple in the lands involved. Appellant points to the principle that, where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of the death of such primary devisee without children or issue, the condition refers to a death without children or issue within the lifetime of the testator, and that, if the primary devisee survives the testator, he takes at the latter's death an estate in fee simple. Appellant cites *Fowler v. Duhme* (1896), 143 Ind. 248, 42 N. E. 623, and like cases. The principle referred to is thoroughly settled, but it remains to be determined whether it is applicable here. The language here, substituting children for heirs, is as follows: "It is my will that Sarah J. Charles have thirty (30) acres of ground \* \* \*, forever provided she have children, if not then at her death," etc. In order that such principle may be applicable, it must first appear that the language used by the testator imports a fee. The provision, "It is my will

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that Sarah J. Charles have thirty acres of ground," is general in nature. Where the devise is in

8. general terms, unaccompanied by words of inheritance or other language defining or indicating the quantity of estate to be taken by the devisee, the common-law rule that only a life estate is thereby created is in force in this state. *Gibson v. Brown* (1916), 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894; *Keplinger v. Keplinger* (1916), 185 Ind. 81, 113 N. E. 292. The language quoted then, if unaided, imports but a life estate.

The word "forever," considered with the quoted language and disassociated from what follows, is sufficient to create a fee. Page, Wills §561;

9. 2 Jarman, Wills (6th ed.) 284. The full expression, however, is: "It is my will that Sarah J. Charles have thirty (30) acres of ground \* \* \*, forever provided she have heirs (children), if not (that is, if she does not have children) then at her death" remainder over as expressed by the item. It is apparent that the ninth item of the will created in Sarah J. Charles at least a life estate in the lands involved. The language by which the testator expressed an intent that she have the land, and that at her death it should go to others, is sufficient to that end. If an estate greater in quantity than a life estate was created in her, it was by virtue of the language "forever provided she have heirs." We have indicated that the word "forever" added to what precedes it was sufficient to create a fee. The relation between the word "forever," however, and what follows it is more intimate than the relation between the word and what precedes it. The thought conveyed to our minds by the language used is not

that she should have the land forever, but rather forever if she have heirs; not “have forever,” but “forever provided”; that she should have the land, and that it should be hers forever provided she have heirs. It would seem that the more reasonable interpretation of the language is that it created a life estate capable on a certain condition of being enlarged into a fee. The condition was that Sarah J. Charles have children. It would seem, therefore, that the condition was precedent rather than subsequent. A condition precedent is an event, the happening or not happening of which causes a conditional estate to vest or to be enlarged. Page, Wills §672; 10 R. C. L. 664. Since the condition was annexed to the life estate, and by its fulfilment such lesser estate might be enlarged into a fee, the estate created is a fee upon condition, rather than a defeasible fee. 40 Cyc 1589, 1593. That such was the intent of the testator seems to be indicated also by the seventh item of the will, wherein is recited that the land was “hereinafter given conditionally to S. Jane Charles.” This language does not import a gift liable to be defeated for condition broken, but rather that the question of whether the subject-matter of the devise became effective as such depended on a condition. As having a bearing, see the following: *Essick v. Caple* (1892), 131 Ind. 207, 30 N. E. 900; *Clark v. Barton* (1875), 51 Ind. 165; *Shimer v. Mann* (1885), 99 Ind. 190, 198, 50 Am. Rep. 82. Appellants interpret the ninth item as if it read in effect as follows: “I give this land to my daughter forever, but if she does not have children,” etc. It in fact reads to the following effect: “I give this land to my daughter, forever if she have children; if she does not have children” then over as

in the item. As we interpret the second conditional clause, it does not signify a condition on the failure to fulfill which an estate in fee theretofore created will determine, but rather that it is introductory to the disposition of the remainder over in case a life estate theretofore created fails to ripen into a fee. But if we should be in error respecting the quantity of the estate created in Sarah J. Charles, it is plain that such estate involves a condition. If such condition should be held to be a condition subsequent, the nonfulfilment of which would determine an estate in fee by said item created, still such condition does not deal primarily with the subject of death without children, but rather with the subject of the birth of children. The birth of children, rather than the death of the devisee, was evidently foremost in testator's mind. Respecting a condition dependent on the birth of children, the following is said: "Such a condition is usually held not to be broken until the death of the person indicated by the condition as the parent of prospective issue, \* \* \*. The fact that it is extremely improbable, or in fact impossible, as where the woman who is indicated as the mother of the issue is past the age of child bearing, does not amount to a breach of the condition." Page, Wills §677. The author, however, in the same section cites *In re Lowman* (C. A.) 2 Chan. 348, that such a condition is broken by the woman involved having passed the child-bearing age, no child having been born to her.

Moreover, the rule for which appellant contends—that is, that a condition respecting death without children or issue annexed to a devise in fee ordinarily refers to the period terminating with the death of the testator—is one of construc-

tion only, and yields readily to the intent of the testator. *Curry v. Curry* (1915), 58 Ind. App. 567, 581, 105 N. E. 951. Here, when the will was finally

9. executed, testator was about seventy-five years of age. His lease on life was presumably short. He died in less than two years. Sarah J. Charles was about thirty years of age when the will was executed. If it should be conceded that, in creating in Sarah J. Charles an estate affected by a condition subsequent rather than precedent, as indicated, the thought prominent in testator's mind was death without children rather than the birth of children, it is not reasonably conceivable that he intended to limit the time granted for the occurring of the event on which such condition was predicated to the remaining days of his life. We conclude that at the death of testator, no child having been born to Sarah J. Charles, she did not take an estate in fee simple in the lands involved, but that her estate in such lands remained affected by the stipulated condition.

We proceed to a consideration of the question whether the adoption of Cora May Nickerson by Sarah J. Charles satisfied the condition de-

11. scribed for the vesting of an estate in fee in the lands involved, if such condition be deemed to be a condition precedent, or prevented a breach of such condition if it should be considered a condition subsequent. It is well to keep in mind that we are not dealing here with the right of Cora May Nickerson as an adopted child to inherit from Sarah J. Charles any estate of which the latter died the owner. Such right cannot be doubted. If Sarah J. Charles were seized in fee of the lands involved, Cora May Nickerson, by virtue of the status created by such



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adoption, inherited the lands at the decease of her adopting mother. The question here is whether, by virtue of such adoption, the condition annexed to the devise of Sarah J. Charles was satisfied, and thereby ceased to exist as a condition, and so that as a consequence she owned the land in fee at her decease.

Since 1855 the following statutes bearing on the status of an adopted child have been in force: "Such court, when satisfied that it will be for the

12. interest of such child, shall make an order that such child be adopted, and from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interests in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother." §870 Burns 1914, Acts 1883 p. 61. "After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education and every other way responsible as a natural father or mother." §871 Burns 1914, §826 R. S. 1881. Respecting such status and the relation of an adopted child to an adopting parent, it is said in substance in *Barnes v. Allen* (1865), 25 Ind. 222, that the adopted child is entitled to inherit from his adopting parent as his heir in the degree of a child, and in *Barnhizer v. Ferrell* (1874), 47 Ind. 335, 338, the following: "The act does not provide that he shall be the child of the adopting parent, but he shall take the name, and be entitled to take his property by descent or otherwise, the same as he would if he was his child or natural heir, and the adopting parent shall

occupy the position toward the child of a father or mother, and be liable in every way as such. In *Schafer v. Eneu*, 54 Penn. St. 304, it is said: 'The right to inherit from the adopting parent is made complete, but the identity of the child is not changed; one adopted has the rights of a child without being a child.' And in *Commonwealth v. Nancrede*, 32 Penn. St. 389, the same court said: 'Giving an adopted son a right to inherit, does not make him a son in fact. And he is so regarded in law, only to give the right to inherit.' " For decisions somewhat conflicting respecting the legal status of an adopted child, see note to *Warren v. Prescott* (1892), 17 L. R. A. 435, and for decisions on the subject of whether an adopted child is included within the meaning of the term "child," as used in the statutes governing distribution of estates of decedents, see note to *Morse v. Osborne* (1910), 30 L. R. A. (N. S.) 914.

Here the will, as we have construed it, is to the effect that Sarah J. Charles should have the land forever if she have children, etc. Our problem is to determine the intent of the testator as gathered from the will, and as illuminated by such surrounding and attending circumstances as may properly be considered. Was it within the intent of the testator that the term "heirs," interpreted by us to mean "children," as used in the ninth item in connection with the devise to Sarah J. Charles, should include a child adopted by Sarah J. Charles after his decease? There seems to be a very great conflict among the decisions on the subject of whether the term "heirs" or "children," as used in wills in relations similar to those involved here, include adopted children. See the following: *Matter of Hopkins* (1904), 43 Misc. Rep. 464, 89 N. Y.

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Supp. 467; *Wyeth v. Stone* (1887), 144 Mass. 441, 11 N. E. 729; *Russell v. Russell* (1887), 84 Ala. 48, 3 South. 900; *Lichter v. Thiers* (1909), 139 Wis. 481, 121 N. W. 153; *Cochran v. Cochran* (1906), 43 Tex. Civ. App. 259, 95 S. W. 731; *Schafer v. Eneu, supra*; *In re Leask* (1910), 197 N. Y. 193, 90 N. E. 652, 27 L. R. A. (N. S.) 1158, and note, 134 Am. St. 866, 18 Ann. Cas. 516; *New York Ins., etc., Co. v. Viele* (1899), 161 N. Y. 11, 55 N. E. 311, 76 Am. St. 238; *Eureka Life Ins. Co. v. Geis* (1913), 121 Md. 196, 88 Atl. 158; *In re Truman* (1905), 27 R. I. 209, 61 Atl. 598.

It will be observed that, as the decision in each case is based upon a will with its own peculiar provisions, and that statutes by no means uniform are involved, the conflict is to an extent apparent rather than real. An examination of the decided cases will disclose also that force is given to certain extraneous circumstances, as whether the testator knew that his devisee had adopted a child; whether the adoption preceded his death; whether the adopted child was a stranger to the blood of the testator, and the like. It follows that to an extent each case must be determined from a consideration of the circumstances which it involves, including the language of the will before the court for construction. Among the attending circumstances that may be considered here are the following: Testator by his will manifested a disposition to make provisions for those related to him by ties of consanguinity. The great bulk of his estate was devised and bequeathed to sons and daughters and to their natural children. In the case of each son and daughter, other than Sarah J. Charles, children having been born to them, he devised in fee and bequeathed by absolute title; but in the case of Sarah

J. Charles, to whom no children had been born, he was careful not to devise in fee, but safeguarded the fee of the involved estate so that, if she did not have heirs or children, it should return to the channels of his natural descendants. At the decease of the testator Sarah J. Charles had adopted no child. Cora May Nickerson was born years after the testator's death. She was adopted in the years of her maturity and when Sarah J. Charles was a very aged woman. Cora May Nickerson was a stranger to the blood of testator. Our statute concerning the adoption of children was enacted shortly before the execution of the will involved, and less than two years before the testator's death. It had not been construed by the courts. It is only in a qualified and limited sense that all men are presumed to know the law. Broom, *Legal Maxims* (8th ed.) §253. As a practical proposition, there is room to doubt whether testator had any knowledge of the existence of the statute providing for the adoption of children. These facts and circumstances are worthy of consideration in arriving at testator's intent, expressed by the language of the will. Such language is: "It is my will that Sarah J. Charles have thirty (30) acres \* \* \*, forever provided she have heirs" (children). Possibly, the word "have" is a key to the situation. As a principal verb it is a word of comprehensive meaning. It is sometimes used in the sense of "to possess" or "to acquire," and the like. Such is its meaning in the early part of the language quoted—that she have thirty acres. In *Horton v. McCall* (1911), 233 Pa. 405, 82 Atl. 472, the phrase "if W has no heirs" was involved, and it was held that the phrase meant "if W should die without issue." In *Bryson v. David-*

*son's Exr.* (1806), 5 N. C. 143, there was a devise to testator's childless daughter, expressed in part by the clause "if the said Mary Long Davidson dies without having issue." The court held that the word "having" included the idea of giving birth to issue. Such decisions, however, are not strictly in point as no question of adoption was involved. There is no doubt that the word "have" in its relation to children is frequently used in the sense of "to possess." It is also used in the sense of "to bear." Webster's International Dictionary. Popularly, there is no doubt that it is frequently used in the latter sense. The will bears on its face abundant evidence that it was not prepared by one skilled in the use of the formal language of the law. It is couched in terms colloquial and somewhat loose rather than technical and exact. Viewing the entire will in the light of surrounding circumstances, it is our judgment that testator used the word here as including the meaning last indicated; that by the phrase "provided she have heirs," testator meant "provided children should be born to her." It is not necessary that we determine here whether such phrase includes also the survival of such children, as none were born.

On first view *Bray v. Miles* (1899), 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510, would seem to be in conflict with the conclusion at which we have arrived. The language of the will involved there and the attending circumstances, however, fairly distinguish that case from the case at bar. Among such circumstances may be mentioned the fact, to which some force is given in the opinion, that the child involved had been adopted by testator's daughter with his knowledge some time prior to testator's death.

Appellees have filed as an additional authority, *Bartholow v. Davies* (1917), 276 Ill. 505, 114 N. E.

1017. Appellees desire that this decision be

13. considered in support of the proposition alleged to be contained in their original brief, and specifically to the effect that the adoption of Cora May Nickerson was invalid because at the time of her adoption she was an adult. It is appellees' contention that only minors may be adopted under our statute. As this specific point was not made in appellees' original brief, we should not be required to consider it. It is apparent from the opinion in this case that we have not found it necessary to determine the question thus tardily presented by appellees. However, the Supreme Court of this state in *Markover v. Krauss* (1892), 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806, uses the following language: "The statute, unlike the statutes of many of the states, contains no provision fixing or limiting the age at which heirs may be adopted. We can see no reason why its provisions may not apply to adults equally with infants." That such was the legislative view of our statute is indicated by the amendment of 1913 (Acts 1913 p. 408, §872 Burns 1914), whereby provision is made to the effect that, if the child is under twenty-one years of age, it may not be adopted without the consent of the father or mother thereto. Such language would seem to indicate that a child over the age of twenty-one years may be adopted.

The judgment is affirmed.

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## NEHER v. KERR.

[No. 9,867. Filed June 4, 1919.]

1. ACCORD AND SATISFACTION.—*Compromise and Settlement.—Unliquidated Claims.—Tender of Check in Full Payment.—Acceptance.*—Where there is a *bona fide* dispute between two parties as to the amount due and owing from one to the other on an unliquidated claim and the debtor tenders a negotiable bank check in full payment and settlement of the amount which he claims is due, and the creditor accepts and cashes it without objection, there is payment and discharge of the account in full. p. 365.
2. ACCORD AND SATISFACTION.—*Compromise and Settlement.—Unliquidated Claims.—Tender of Check in Full Payment.—Acceptance.*—Where, on the arrival of a quantity of logs, the buyer called the seller on the telephone and informed him that he would not receive the logs because they were under size and defective, and the seller ordered the buyer to unload the logs, stating that he would make it all right with the buyer, there was an unliquidated claim, and, there being a good-faith dispute concerning the amount due thereon, the accepting and cashing by the seller of a check sent by the buyer in full payment of the claim operated as an accord and satisfaction. p. 366.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Wesley Wade Kerr against Daniel I. Neher. From a judgment for plaintiff, the defendant appeals. *Reversed*.

*Shirts & Fertig, James V. Kent and Thomas M. Ryan*, for appellant.

*Floyd G. Christian, Ralph H. Waltz and Ira W. Christian*, for appellee.

McMAHAN, J.—The appellee brought this action against the appellant on *quantum meruit* to recover a balance of \$161.45 alleged to be due and owing for lumber sold to appellant. There was an answer of

general denial, payment, and accord and satisfaction, trial by court, special finding of facts, conclusions of law, and judgment for appellee in sum of \$109.62.

With the exception of some technical objections which the appellee urges as to the sufficiency of appellant's brief, there is but one question in this appeal, that is, Was there such an unliquidated and disputed claim existing between appellee and appellant at the time appellant tendered appellee a check in full payment of the claim that appellee's retention of this check amounted to an accord and satisfaction of the claim sued on in this action?

Appellant's brief is in substantial compliance with the rules of this court.

The facts as found by the court are: That appellee offered to sell to appellant two carloads of sugar, walnut, poplar and cherry logs at a certain price per hundred feet. The walnut logs were to be of not less than twelve inches in diameter and to be free from defects. Appellant agreed to purchase the logs and to pay \$4.50 per hundred feet for the walnut logs, and \$3 for the cherry and poplar logs. Appellee loaded the logs on cars, and shipped them to appellant at Frankfort, Indiana. When the logs arrived at Frankfort, appellant discovered that twenty-five per cent. of the walnut logs were under twelve inches in diameter; that the largest one was cut half in two, and that twenty-five per cent. of them were what is known as culls. Appellant, on seeing the logs, called appellee by telephone and refused to receive them because they were under size and defective. Appellee at this time ordered appellant to unload the logs, and stated that he, appellee, would make it all right with appellant. In June, 1914, appellant paid appellee by check



\$161.45. This check was mailed to appellee inclosed in a letter, in which appellant notified appellee that said check was made out for the full amount and value of the logs, and that said check was tendered in full payment for said logs, and that appellant would refuse to pay any more for them. Appellee, being so notified, accepted said check, cashed the same before the commencement of this action, and without any further communication passing between appellant and appellee with reference thereto. There was at the time appellee accepted said check a *bona fide* dispute between appellant and appellee as to the value of said logs and the amount which should be paid therefor. The cash value of the logs was \$271.07, which includes 602 feet of sugar logs which the court found were worth \$6.02. There is no finding as to what was to be paid for the sugar logs. Upon these facts the court concluded that the law was with the appellee, that appellee should recover \$109.62, and judgment was rendered accordingly.

The errors assigned are that the court erred in its conclusions of law.

It is well settled that, where there is a *bona fide* dispute between two parties as to the amount due and owing from one to the other on an *unliquidated*

1. claim, and the debtor tenders a negotiable bank check for the amount which he claims is due, and tenders the same in full payment and settlement, and the creditor accepts and cashes the same without objection, it is a payment and a discharge of the account in full. *Wells v. Morrison* (1883), 91 Ind. 51; *Neubacher v. Perry* (1914), 57 Ind. App. 362, 103 N. E. 805; *American Seeding Mach. Co. v. Baker* (1914), 55 Ind. App. 625, 104 N. E. 524; *Miller Bros. & Co. v.*

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Pittsburgh, etc., R. Co. v. Friend—70 Ind. App. 386.

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*Lesinsky* (1918), (Tex. Civ. App.) 202 S. W. 992; 1 R. C. L. 194.

Appellee contends that the claim sued on was liquidated, and that the acceptance and cashing of the check for an amount less than the full

2. amount does not amount to a satisfaction of the account, and cites *Jennings v. Durlflinger* (1900), 23 Ind. App. 673, 55 N. E. 979, and *Meyer v. Green* (1898), 21 Ind. App. 138, 51 N. E. 942, 69 Am. St. 344, in support of this contention. The account sued on was not liquidated. An action on *quantum meruit* is always unliquidated. *Chicago, etc., R. Co. v. Clark* (1899), 92 Fed. 968, 35 C. C. A. 120; *Nassoii v. Tomlinson* (1896), 148 N. Y. 326, 42 N. E. 715, 51 Am. St. 695.

Although the court found that the appellant was in the wrong as to the amount due the appellee, this fact has no bearing on the question raised by appellee's retention of the check. *Neubacher v. Perry, supra*. The claim between the parties being unliquidated, and there being a good-faith dispute concerning the amount due, the court erred in its conclusions of law.

The cause is reversed, with directions for the court to restate its conclusions of law in favor of appellant, and to render judgment in accordance therewith.

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PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. FRIEND.

[No. 9,420. Filed February 8, 1918. Rehearing denied June 28, 1918. Transfer denied June 4, 1919.]

1. NEGLIGENCE.—*Pleading*.—*Elements*.—Elements essential to the sufficiency of a complaint based on negligence are allegations

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showing the existence of a duty resting on defendant to exercise care in favor of plaintiff, and a failure on the part of defendant to discharge such duty proximately resulting in some injury or damage to plaintiff. p. 373.

2. **CARRIERS.—Railroads.—Passenger Boarding Train.—Duty of Carrier.—Complaint.**—In a passenger's action against a railroad for injuries sustained in attempting to board a train, allegations in the complaint that plaintiff purchased a ticket entitling him to take passage on a certain train, and that he went on the station platform to await its arrival with intent to become a passenger, show at least a qualified relation of passenger and carrier, which imposed on defendant the duty of using ordinary care to protect plaintiff while trying to get aboard. p. 373.
3. **CARRIERS.—Railroads.—Passenger Boarding Train.—Carrier's Breach of Duty.—Complaint.—Sufficiency.**—In a passenger's action against a railroad company for injuries sustained in attempting to board a train, allegations in the complaint that persons standing near called to the trainmen to wait until they should all get on, but that defendant's employes, in violation of their duty to plaintiff to hold the train until plaintiff could safely board it, negligently and carelessly caused the same to pull up, sufficiently showed a failure on the part of the defendant to use ordinary care to protect plaintiff. p. 373.
4. **CARRIERS.—Railroads.—Injuries to Passenger.—Action.—Complaint.—Contributory Negligence.**—In a passenger's action against a railroad company for personal injuries, complaint held not to show contributory negligence, although plaintiff's injuries were sustained in attempting to board a train while it was in motion. p. 374.
5. **NEGLIGENCE.—Complaint.—Sufficiency.—Contributory Negligence.**—Although an answer of general denial to a complaint based on negligence, in an action for personal injuries, tenders the issue of contributory negligence, the complaint is not required to negative it, and is demurrable only where its averment affirmatively shows contributory negligence. p. 374.
6. **CARRIERS.—Railroads.—Injuries to Passenger.—Proximate Cause.—Negligence.—Pleading.**—In an action against a railroad for personal injuries sustained by plaintiff in attempting to board a train while in motion, averments in the complaint that because of defendant's employes' negligent and careless movement of the train, in violation of their duty to hold it until plaintiff could safely board the same, the train was jerked and pulled along faster, and that plaintiff's foot was caused to slip through a broken part of a car step, alleged to have been negligently maintained in a defective condition, show a causal connection between the alleged negligence and plaintiff's injury. p. 374.

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7. **CARRIERS.—Railroads.—Passengers Boarding Train.—Duty of Carrier.**—Although the stopping of a passenger train at a station is an invitation to passengers to get on, which ceases when the train starts, it must be stopped a reasonable length of time, and any one attempting to get on after it begins to move does so at his own risk, unless those in charge of the movement of the train have knowledge of the intent or attempt of such party to board it. p. 375.
8. **CARRIERS.—Railroads.—Passengers Boarding Train.—Duty of Carrier.**—Where a family bought their tickets and went on the station platform to await the arrival of the train, those in charge of the movement of the train were chargeable with knowledge of such facts, and owed such passengers the duty of stopping a reasonable length of time for them to get on. p. 375.
9. **CARRIERS.—Railroads.—Passenger Boarding Moving Train.—Defective Step.—Contributory Negligence.—Proximate Cause.—Questions of Fact.**—In a passenger's action against a railroad for personal injuries, *held* that the court on appeal could not say as a matter of law, under the evidence, that plaintiff, who was injured when his foot slipped through a defective car step while attempting to board a moving train with a child in his arms, was guilty of contributory negligence, or that the carrier was not guilty of negligence proximately causing the injury. p. 377.
10. **CARRIERS.—Railroads.—Passengers.—Injuries on Station Grounds.—Care Required of Railroad.**—A carrier owes a passenger who is on the depot platform waiting to take passage on a train only ordinary care not to injure him. p. 377.
11. **APPEAL.—Review.—Instructions.—Prejudicial Error.**—In an action against a railroad company for personal injuries sustained by a passenger in attempting to board a train, where a controlling question in the case was whether defendant had exercised ordinary care, it was reversible error to instruct that defendant owed plaintiff the highest degree of care. p. 378.

From Miami Circuit Court; *Charles A. Cole*, Judge.

Action by Ransford Friend against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*G. E. Ross*, for appellant.

*Frank D. Butler, James C. Blackledge and Wolf & Barnes*, for appellee.

HOTTEL, J.—The complaint on which this action is predicated is in one paragraph, the averments of which are in substance as follows: Appellant is a railroad corporation, and as such, on and prior to April 26, 1913, owned and operated a line of railroad running from the city of Columbus, Ohio, to the city of Logansport, Indiana. Said road passes through the town of Amboy, Indiana, and appellant at said times operated over its road through said town passenger trains on which it carried passengers for hire, among which was a westbound train scheduled to pass through said town about 6 p. m. On April 26, 1913, fifteen or twenty minutes before said train was scheduled to arrive at Amboy, appellee, accompanied by his wife and three children, went to appellant's ticket office at said station, and there purchased and received tickets for himself and the other members of his family, entitling them to passage on said train from Amboy to Bunker Hill, the latter town being a station on appellant's said road between Amboy and Logansport. Appellant's line of road was double-tracked through said town, and said train on which appellee procured said passage was scheduled to pass on the north track of the double track. There was a concrete platform on the north side of said track which appellant had provided for the accommodation of its passengers in alighting from and taking passage on its trains. After purchasing said tickets, and before said train was scheduled to arrive, appellee with his family went upon said platform, and there waited to take passage on said train. On said day the Wallace and Hagenbeck show gave a performance at Marion, Indiana, and large crowds of people who had gone from Amboy and other points to Marion to attend said

show returned on the train on which appellee and his family had procured passage. When the train arrived it was ten or fifteen minutes late, and there was a large number of people attempting to get off. There was a number of coaches, additional to those ordinarily attached to said train, for the purpose of accommodating the extra passengers caused by the attendance at said show. The platform of the car which appellee and his family attempted to get on was crowded, and, on account of the crowds getting off, they had difficulty in reaching the steps. The train officials were hurrying the crowds off and on, so that said train could be started quickly. The appellee's wife and one child attempted to get on the rear end of one of the cars, and were enabled to get on the steps just as the car was starting. The officials and employes of appellant in charge of said train carelessly and negligently failed and neglected to hold it until appellee could safely get upon it, but carelessly and negligently started it before the passengers, and especially appellee, on account of said congested condition of the traffic, could get on. Appellee was unable to get upon the train before it started, although he was immediately behind his wife and child, who did get on. Appellee then picked up his youngest child, a boy about eight years old, holding the said child in his left arm, and attempted to get on the front end of the car, immediately in the rear of the one upon which his wife and child had stepped. The train, as aforesaid, was started negligently and carelessly before he could get on the steps of the car, "*although persons standing near called out to the trainmen, and in their hearing, to wait until the passengers should all get on.*" Notwithstanding this, the defendant's em-

ployes and officials, in charge of said train, did *in violation of their duty to plaintiff as aforesaid, negligently and carelessly cause the same to pull up*, and plaintiff could not get on the front end of said car, as he attempted to do. Prior to that time, the defendant had carelessly and negligently permitted the steps at the rear end of the same car to become defective and broken. \* \* \* Pieces had been broken out of the said steps, so that it was dangerous for passengers to step thereon, the condition of which step plaintiff cannot more particularly describe. \* \* \* The train moved slowly, at the rate of not more than three or four miles per hour, until the rear end of the train came by the plaintiff, when the plaintiff, in a careful and prudent manner, caught hold of the rails, prepared for that purpose, with his right hand, and stepped upon the steps of the said car. \* \* \* Plaintiff, at that time, thought that his whole family, except the child that he had in his arms, was upon the train, and he knew that he had in his possession, the tickets for all of the family, and that in the hurry of the moment to get on with his family, he acted carefully and prudently, and did so step upon the said step. \* \* \* Because of the said negligent and careless movement of the said train by the defendant's employes in violation of their duty to hold said train until plaintiff could safely get upon the same the said train was then jerked and pulled along faster, and the plaintiff's foot was caused to slip through the broken part of said step, and he was thrown to the ground, between the edge of the platform and over the rail of the track." (*Italics inserted.*)

A demurrer to the complaint, accompanied by a

proper memorandum, was overruled, and the cause put at issue by a general denial. A trial by jury resulted in a verdict for appellee in the sum of \$2,500. A motion for a new trial, and a motion in arrest of judgment, filed by appellant, were each overruled, after which judgment was rendered on said verdict. The errors assigned in this court and relied on for reversal challenge each of the rulings of the trial court above indicated.

Eight objections to the complaint are stated in the memorandum accompanying said demurrer, which appellant has summarized in its "points and authorities" under four subheads in substance as follows: (a) and (b) No facts are alleged in the complaint showing that appellant owed the appellee any specific duty at the time and place and under the circumstances alleged, or, in other words, the averments fail to show that it was appellant's duty to protect appellee from the injury complained of. (c) No facts are alleged showing that the failure to hold the train at the station long enough to give appellee a reasonable time to get aboard was the proximate cause of the injuries for which appellee sues, but, on the contrary, show that the proximate cause of said injuries was his attempt to get on the train while it was in motion, he at the time knowing it was in motion. (d) A complaint predicated on negligence, to be sufficient, must show three things to have co-existed: (1) The existence of a duty to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform such duty; (3) an injury to the plaintiff resulting from such failure of the defendant. It is claimed that these elements are not all shown and brought together under the facts alleged in this complaint.



The last objection, we think, in effect covers the preceding two objections.

Said elements essential to the sufficiency of a complaint based on negligence are sometimes stated, and we think more accurately so, as follows: “(1)

1. The existence of a duty resting on the defendant to exercise care in favor of plaintiff; (2) failure on the part of the defendant to observe such duty; and (3) some injury or damage to the plaintiff resulting proximately from such failure on the part of the defendant.” *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 656, 104 N. E. 866, 106 N. E. 739.

The averments of the complaint here involved show that the appellee purchased of appellant tickets which entitled him and the members of his family to

2. passage on the train which they afterward attempted to board, and that they then, with an intent to become passengers on said train, went upon appellant's platform where passengers got on and off its trains, to await its arrival. These averments show at least a qualified relation of passenger and carrier between appellant and appellee, which imposed on appellant the duty of using ordinary care to protect appellee from injury while trying to get aboard said train (*Pere Marquette R. Co. v. Strange* [1908], 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. [N. S.] 1041; *Indianapolis, etc., R. Co. v. Wall* [1913], 54 Ind. App. 43, 48, 101 N. E. 680), and the

3. averments which we have italicized *supra* are sufficient to show a failure to perform said duty. *Indianapolis, etc., R. Co. v. Wall, supra*; *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co., supra*, and cases there cited.

By the authority last cited, it is well settled that a general charge of negligence, that is to say, a charge that "an act was negligently done or negligently omitted is a sufficient charge that the defendant failed to use ordinary care." Said case is well considered, and furnishes a complete answer to appellant's objections to the complaint here involved.

There are no specific averments in the complaint that overcome the general charge of negligence made against appellant, nor are there any specific

4. averments therein showing that appellee was guilty of any negligence contributing to his injuries.

While the general denial tenders the issue of contributory negligence, or rather admits proof of such fact, the complaint is not required to negative

5. it, and such complaint becomes susceptible to demurrer because of its averments affecting such question only when such averments affirmatively show the plaintiff guilty of such negligence. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 405, 97 N. E. 822.

The last paragraph of the quoted averments of the complaint, *supra*, shows a causal connection between appellee's said injury and appellant's said neg-

6. ligent and careless movement of said train, and its careless and negligent maintenance of said defective and broken step. After describing appellee's said injuries, such complaint contains the further averment that "all of said conditions are the direct result of said negligence and carelessness of defendant." We therefore conclude that the complaint contains averments sufficiently showing all the elements essential to appellee's cause of action.

In support of that ground of its motion for new trial which challenges the sufficiency of the evidence, appellant insists that the undisputed evidence

7. shows that appellee attempted to get on the train after it was in motion, going three or four miles an hour; that he knew that it had started before he attempted to get on; that there is no evidence showing that the appellant's agents had any knowledge that he was attempting to get on the train when they started to move it. Upon the assumption that these facts are undisputed, appellant argues, in effect, that there is no showing that appellant violated any duty it owed to appellee; that while the stopping of said train at said station was an invitation to passengers to get on, such invitation continued during the stop only; that the movement of the train was a notice and warning to everybody, then present intending to get on such train, that the invitation to get on was withdrawn, and that anyone thereafter attempting to get on did so at his own risk, and that, as to such a party, the appellant owed no care in the absence of a showing that its agents in charge of the movement of said train had knowledge of the intent or attempt of such party to get on.

The legal proposition involved in this contention is correct, subject to the condition that the train was stopped a reasonable length of time for the

8. passengers to get on and off, but we are of the opinion that the facts in this case do not show the conditions which warrant the application of said principle. The evidence shows that appellee had purchased tickets which entitled him and his family to passage on said train, and that they then went upon the platform provided by appellant for that purpose, to await

the arrival of said train that they might take passage upon it. The appellant's agents in charge of the movement of said train were chargeable with knowledge of said facts, and hence owed to such passengers the duty of stopping a reasonable length of time for them to get on. *Indianapolis, etc., R. Co. v. Wall, supra*, 47, 50; *Lake Erie, etc., R. Co. v. Beals* (1912), 50 Ind. App. 450, 98 N. E. 453.

There was also evidence tending to show that there was a crowd at the depot when the train arrived; that there had been a show at a neighboring town; that a good many passengers got off; that there was undue haste on the part of those in charge of the train to start it; and that they did not hold such train a reasonable time under the circumstances for passengers to get off and on; that *someone told the brakeman that he ought to wait until the passengers got on the train*; that appellee with his wife and children made every reasonable effort to get on the train as soon as they could; that appellee's wife and one or more of his children got on; that he thought that they were all on except himself and a small child; that as the wife stepped forward to the steps, the appellee did also; that this was *immediately after the people got off*; that appellee had the tickets for the other members of his family; that about the time his wife and children got on, the train started and he grabbed up the small child in his arms just as the train started, and got hold of the rail with his right hand and stepped on the step, and it "gave way and let him down \* \* \* under the train."

The appellee himself testified in part as follows: "I saw by the appearance that the train was going to start. My wife made for one step, and I grabbed

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the boy, going to step on the next pair of steps, there were still people there getting on." The train was moving very slowly, about two or three miles an hour. "I took hold of the handrail with my left hand and stepped on the steps. Q. Did you get your feet on the steps? A. Yes sir. Q. What else? A. It gave way. That caused my hand to slide right down the handrail. Q. What gave way? A. The step that I had my feet on."

Under this evidence, this court cannot say as a matter of law, either that appellee was guilty of negligently contributing to his injury, or that appel-

9. lant was not guilty of negligence that was the proximate cause of such injury. *Evansville, etc., R. Co. v. Duncan* (1867), 28 Ind. 441, 92 Am. Dec. 322; *Jeffersonville, etc., R. Co. v. Hendricks, Admr.* (1872), 41 Ind. 48, 66; *Pennsylvania Co. v. Marion* (1890), 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. 330; *Louisville, etc., R. Co. v. Crunk* (1889), 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; *Indianapolis, etc., R. Co. v. Wall, supra*, and cases cited; *Louisville, etc., R. Co. v. Bean* (1893), 9 Ind. App. 240, 36 N. E. 443; *Atchison, etc., R. Co. v. Holloway* (1905), 71 Kan. 1, 80 Pac. 31, 114 Am. St. 462; *Wooten v. Mobile, etc., R. Co.* (1901), 79 Miss. 26, 29 South. 61; *Johnson v. West Chester, etc., R. Co.* (1872), 70 Pa. St. 357; 3 Thompson, Negligence §2995.

Appellant next challenges the giving of certain instructions. Number 3, given at appellee's request, is as follows: "If you should find from the evi-

10. dence in this case that the plaintiff purchased a ticket entitling him to passage over defendant's railroad, and if you should further find that after purchasing such ticket the plaintiff passed upon

the platform of the defendant for the purpose of taking passage upon the defendant's train, then I charge you that the relation of carrier and passenger existed and that the defendant owed to the plaintiff the duty of exercising the highest degree of care for the plaintiff's safety, and to permit the plaintiff to enter upon the defendant's train in safety."

This instruction makes the standard care due to a person on the depot platform about to take passage on a train the same as that due one already on the train. Under it appellant was in effect required not only to stop its train a reasonable length of time to allow passengers to get on, but it was also required to see and know that no one was attempting or intending to get on the train before starting it. The law recognizes a distinction between the care due to a passenger on the train and that due to one who is merely on the platform waiting to get on such train. To the former the railroad company owes the highest degree of care, while to the latter it owes ordinary care not to injure him. *Indianapolis, etc., R. Co. v. Wall, supra*, 49; *Pere Marquette R. Co. v. Strange, supra*, 166, 167, and cases cited.

Under these cases, the instruction given was clearly erroneous.

Appellee, while he insists that the instruction was not erroneous, also insists that, even if erroneous, it was not harmful because the evidence shows

11. that appellant did not exercise ordinary care toward appellee. We cannot agree with this contention. The instruction was pertinent to and influential in the determination of a controlling question in the case. The facts affecting such question were such that the jury might very well have found

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in favor of appellee, if such question were to be determined by the tests contained in the instruction, or for the appellant, if the question were to be determined by the correct test, indicated as applicable in the cases *supra*.

The giving of other instructions is challenged, but they are in effect disposed of by what we have already said.

Appellant also challenges the action of the trial court in refusing certain instructions tendered by it, but, in view of what we have already said, we deem it unnecessary to discuss them.

For the error in giving instruction No. 3, *supra*, the judgment below is reversed, with instructions to the trial court to sustain appellant's motion for a new trial, and for such other proceedings as may be consistent with this opinion.

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KENNEY ET AL. v. MONROE ET AL.

[No. 9,883. Filed June 5, 1919.]

1. MORTGAGES.—*Foreclosure.—Redemption by Mortgagee.*—After a mortgagee has once sold the land upon an execution or decree, he cannot redeem from his own sale, in the event that it produces less than the whole amount of the judgment, thereby restoring the lien of the judgment and subjecting the property to resale the same as if no previous sale had been made. p. 335.
2. MORTGAGES.—*Assignment of Mortgage.—Foreclosure by Assignee.—Assignment of Deficiency Judgment to Assignee.—Right to Redeem.—Statutes.*—Where a mortgagee assigned a mortgage and the note secured thereby as collateral to secure the payment of his note to assignee, and, upon foreclosure by assignee, the trial court gave assignee and another creditor of mortgagee liens upon the proceeds of sale to the amount of their debts against assignee, for which sum the property was sold, mortgagee, who had only constructive knowledge of the foreclosure proceedings

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and to whom the unpaid balance of the personal judgment rendered against mortgagor had been assigned, was entitled to redeem the land from the sheriff's sale upon compliance with §§814, 815 Burns 1914, §§771, 772 R. S. 1881. p. 386.

From Marion Superior Court (101,294); *W. W. Thornton*, Judge.

Action by James G. Kenney and another against Clara Monroe, Samuel S. Rhodes and others, in which Rhodes filed a cross-complaint. From the judgment rendered, plaintiffs and cross-complainant appeal. *Reversed.*

*David A. Meyers*, for appellants.

*R. M. Coleman*, for appellees.

NICHOLS, P. J.—By this action appellants sought to require appellee Stein, Jr., who was clerk of Marion Circuit Court, to permit appellants to redeem certain real estate from a sheriff's sale, and to contest the rights of appellees Clara A. Monroe and others to redeem the same.

The cause was submitted to the court for trial without the intervention of a jury. There was a request for special findings of fact, which were made, with conclusions of law in favor of the appellees. Upon the conclusions of law judgment was rendered in favor of the appellees against appellants James G. Kenney and Lucy W. Kramer upon their complaint, and in favor of appellee against appellant Samuel S. Rhodes, upon his cross-complaint. From this judgment this appeal is prosecuted.

The errors relied upon for reversal, and here considered, are: Errors of the court, respectively, in its first, second, third, fourth, fifth, sixth, seventh and eighth conclusions of law. Proper exceptions were saved to the court's conclusions of law.



Counsel for appellee has not favored us with a brief and we have no discussion of the law of this case from the appellee's standpoint.

The substance of so much of the special findings of fact as is necessary for this decision is as follows: On May 26, 1913, Jacob C. Lipps and wife were the owners of certain real estate in Marion county, Indiana, upon which they executed a mortgage to James G. Kenney to secure the payment of a note of \$2,000. Said mortgage and note were assigned to one Lena Dunham on August 5, 1913, as collateral security for the payment of a note of \$300 executed by said Kenney on said date. Said \$300 note, and mortgage assigned as its collateral security, were on February 4, 1914, indorsed to one Jean Barnard. On February 18, 1915, said Jacob C. Lipps and wife conveyed said real estate to one Samuel E. Hamlin without any consideration therefor, and on May 4, 1915, said Hamlin executed to appellee Clara A. Monroe a mortgage on said real estate to secure the payment of a note of \$1,500. On June 1, 1914, said Jean Barnard filed her complaint in the Marion Circuit Court making as defendants therein James G. Kenney, Jacob C. Lipps, and his wife, Alma K. Lipps, William S. Taylor and Lena Dunham, said action being to foreclose the said mortgage assigned as collateral security for the payment of said \$300 note, and for the further purpose of collecting by attachment a claim held by one William S. Taylor against said Kenney. In this foreclosure proceeding there was a judgment in favor of said Barnard, and against the defendant Jacob C. Lipps, in the sum of \$2,258 and costs, and the foreclosure of the equity of redemption of Kenney, Lipps and his wife, William S. Taylor and Lena Dunham,

and all other persons claiming from, under, or through them, in and to the said real estate, being the real estate described in the complaint and cross-complaint. It was ordered and adjudged by the court that the said real estate be sold by the sheriff as other land was sold on execution without relief from valuation and appraisement laws. It was further adjudged that the said Barnard was entitled to recover from said appellant Kenney the sum of \$345 and costs, and that said Taylor was entitled to recover of said appellant Kenney \$268.75 and his costs, and that said Taylor have a lien upon the proceeds of the sale of said real estate, and that the same be paid from the proceeds of such sale subject only to the lien of said Barnard. There was an order that the proceeds of such sale be applied: First, to the payment of costs on the complaint and cross-complaint; second, to the payment to the said Barnard of the said sum of \$345 with interest and costs; third, to the payment to the cross-complainant, William S. Taylor, of the amount found due him, being \$268.75; fourth, and the over-plus, if any, after the amounts found due herein from said appellant Kenney to said Barnard and to said Taylor, to be paid to the clerk of the court for the use of said Kenney, or to the party lawfully entitled and authorized to receive the same. A certified copy of said decree was placed in the hands of the sheriff of said county, directing him to sell said real estate, and he did so sell it to Jean Barnard for the sum of \$779.37, which amount was paid by said Barnard to the sheriff, and a certificate of sale in due form as required by law was issued by the sheriff to her. Said Barnard assigned and transferred said certificate for a valuable consideration to one James C. McDonald

and said William S. Taylor, and these assignees transferred and assigned said certificate for a valuable consideration to appellee Samuel S. Rhodes, and said Rhodes has ever since been the sole owner of said certificate. At the end of the year for redemption from such sale said Rhodes presented said sheriff's certificate of sale to the clerk of Marion Circuit Court, and requested a certificate of no redemption, which the clerk refused to give him, and thereupon said Rhodes presented said certificate of sale to the sheriff of said county, requesting him to execute a deed to said Rhodes, which the said sheriff refused to do. Said James G. Kenney did not appear in person or by attorney in the foreclosure proceedings in the Marion Circuit Court, and had no actual notice of the pendency of said action, or the rendition of said judgment and decree, until long after the date of said sheriff's sale. Said Kenney was a nonresident of the State of Indiana, and was notified of the pendency of said action by publication of notice. On November 12, 1915, said Barnard assigned and transferred to said Kenney the unpaid balance of the judgment against Jacob C. Lipps, rendered in the foreclosure proceedings in the Marion Circuit Court, which assignment was duly recorded. On November 6, 1915, said appellee Clara A. Monroe presented and filed with the clerk of the Marion Circuit Court an affidavit and statement in redemption of said real estate from said sheriff's sale, and paid to the clerk the amount of money required to effect the redemption, including costs of redemption, to wit, \$844.22. On November 11, 1915, the appellants tendered to the clerk of the Marion Circuit Court an affidavit and statement for redemp-

tion of said real estate from sheriff's sale, and, on the same date, tendered in legal tender of currency the sum of \$846.72 for the purpose of redeeming said real estate from said sheriff's sale, which sum was more than sufficient for that purpose; and on November 12, 1915, said parties again tendered said affidavit and statement for the redemption of said real estate to said clerk and again tendered to him the said sum of money. Said clerk refused to accept and file the affidavit and statement, and refused to accept said sum of money thus tendered on both of said dates. It appears by the affidavit that said appellants based their right to redeem said real estate upon the fact that said appellant Kenney had the said valid mortgage upon said real estate for \$2,000, which he had pledged to said Dunham as collateral security for the payment of a note of \$300 which said Kenney had executed, and that said note had been assigned to said Barnard, who, in the foreclosure suit, foreclosed said \$2,000 mortgage as collateral security for the payment of said \$300 note against said Kenney and others. Kenney was made a party defendant to said action by publication of notice, but he had no actual notice or knowledge of the pendency of said cause, until after decree was rendered on September 18, 1914. There was due at that date \$2,158, not including attorney's fees of \$100, and said Kenney was entitled to the full amount thereof, less costs and the claims held by the plaintiff and cross-complainant, William S. Taylor, and the balance due said Kenney under the terms of said decree was a lien upon all of said real estate subsequent and junior to the claims of appellee Monroe and said Taylor. The affidavit states that appellant Kramer was the real owner of

the balance due under said mortgage and decree, and that said Kenney desires to make this redemption for her use and benefit. The balance due upon said judgment was \$1,378.63, with interest at six per cent. since September 18, 1914. It was found by the court that nothing in this proceeding should in any manner affect the rights of said defendant Rhodes, as the present holder of the sheriff's certificate.

On these findings of fact the court states its conclusions of law as follows: (1) That the law is with the defendants. (2) That the plaintiffs are not entitled to have any of the entries of the clerk of this court relating to the redemption of said real estate from said sheriff's sale by the defendant Monroe vacated. (3) The plaintiffs did not have and hold the first right to redeem said lots from said sheriff's sale under and by virtue of their judgment rendered September 18, 1914. (4) The plaintiffs were not entitled to any order compelling the defendant Theodore Stein, Jr., clerk of this court, to accept and file said affidavit of November 12, 1915, and to allow plaintiffs to redeem from said sheriff's sale. (5) The defendant Theodore Stein, Jr., as clerk of this court is not compelled to accept said sum of \$846.72 tendered by the plaintiffs. (6) That the plaintiffs are entitled to take nothing by the complaint or the defendant Rhodes anything by his cross-complaint. Nos. 7 and 8 are conclusions as to costs.

We are not unmindful of the rule of law that a mortgagee, after he has once sold the land upon an execution or decree, cannot redeem from his

1. own sale, in case it produces less than the whole amount of the judgment, thereby restoring the

lien of the judgment and subjecting the property to resale the same as if no previous sale had been made. *Green v. Doane* (1877), 57 Ind. 186; *Hervey v. Krost* (1888), 116 Ind. 268, 19 N. E. 125, and *Horn v. Indianapolis Nat. Bank* (1890), 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. 231, sustain this principle of law. It is said, however, in the case of *Hervey v. Krost, supra*, that the courts favor and give a liberal construction to redemption laws in the interest of the debtor, and others who are concerned, that the debtor's property shall go toward the payment of his debts to the full extent of its value. It is evident that this has not been accomplished in the case at bar.

The cases above cited are to be distinguished from the instant case, in this, that it was evidently not the primary object in this action to foreclose the

2. mortgage and collect the debt in favor of appellant Kenney, but to collect the debt in favor of said Jean Barnard, and the debt in favor of William S. Taylor. Appellant Kenney did not institute the foreclosure proceeding, had only constructive knowledge of it by publication of notice in a newspaper, and had no actual knowledge whatever of said suit, or of the foreclosure sale thereunder.

By the judgment of the court the plaintiff in said foreclosure suit was given a lien on the proceeds of the sale of \$345, and the cross-complainant, William S. Taylor, was given a lien against such proceeds in the sum of \$268.75, which respective sums were to be paid out of the proceeds of such sale, and the overplus, if any, to be paid to appellant Kenney. The effect of this judgment was the same as if said appellant Kenney had been a judgment creditor with a separate lien, subject and second to the liens of said Barnard and said Taylor.

It is evident that such real estate sold only for the amount of the Barnard and Taylor debts, plus attorney's fees and costs, and that no consideration whatever was given to the protection of the rights of appellant Kenney; in other words, the primary purpose of this proceeding and sale was the collection of the debts of said Barnard and Taylor.

Under these facts we have no hesitation in saying that equity and good conscience require that appellant Kenney should have been permitted, under §§814, 815 Burns 1914, §§771, 772 R. S. 1881, and upon complying with the terms of such sections, to redeem said real estate from the sheriff's sale thereof, and upon tender of the sum of \$846.72 to appellee Stein, Jr., clerk, the same should have been accepted in redemption, and a proper certificate thereof should have been issued by the clerk to said appellant Kenney.

Other questions are presented for our consideration, but we do not deem it necessary to discuss them.

The judgment is reversed, with instruction to the trial court to restate its conclusions of law in harmony with this opinion, and the costs of this appeal are taxed to the appellees.

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CENTRAL BANK OF WEST LEBANON v. MARTIN.

[No. 9,570. Filed November 26, 1918. Rehearing denied January 31, 1919. Transfer denied June 5, 1919.]

1. *INSURANCE. — Casualty Insurance Companies. — Investments. — Proceeds from Sale of Stock. — Statute.*—Under §4769 Burns 1914, Acts 1909 p. 281, prescribing how casualty companies shall invest the money received from the sale of their capital stock, such a company is not prohibited from depositing any of its funds in banks, and taking therefor certificates of deposit, payable either

on demand or on a day specified, until such time as investments in accordance with the statute may be made, or from assigning notes given for the purchase price of stock, and receiving certificates of deposit therefor. p. 391.

2. **INSURANCE.**—*Casualty Insurance Companies.*—*Investments.*—*Proceeds from Sale of Stock.*—*Rights of Stockholder.*—*Statute.*—While the investment by a casualty company of money received from the sale of its capital stock in securities other than those named in §4769 Burns 1914, Acts 1909 p. 281, would be wrongful, yet the transaction would not be void, but merely voidable, and, though a stockholder injured thereby might find a way in a court of equity to protect his rights, he cannot defend an action on his note given to such company for stock and assigned to plaintiff bank in return for its certificate of deposit on the ground that the transaction constituted an unlawful investment of the proceeds from the sale of the capital stock of the company. p. 392.
3. **PLEADING.**—*Answer.*—*Sufficiency.*—If an answer is good on any theory, it is error to sustain a demurrer thereto. p. 393.
4. **PLEADING.**—*Answer.*—*Indefiniteness.*—*"Pretended" Corporation.*—In an action on a note assigned by a casualty insurance company, a reference in a paragraph of answer to the assignor as a "pretended" corporation cannot, in the absence of the facts being pleaded, have any weight as against an averment that such company purports to have been organized under the statute. p. 393.
5. **PLEADING.**—*Conclusion of Law.*—In an assignee's action on a note, an averment that assignor corporation had no power to assign the note states a proposition of law, since the powers of a corporation are determined by law. p. 393.
6. **PLEADING.**—*Pleading Conclusions of Law.*—*Statute.*—The provision of §343a Burns 1914, Acts 1913 p. 850, authorizing the pleading of conclusions, subject only to a motion to make more specific, means a conclusion of fact, and does not warrant the pleading of a pure conclusion of law. p. 393.
7. **APPEAL.**—*Matters Reviewable.*—*Assignments Not Involved in Judgment.*—Assignments of error not involved in the judgment rendered cannot be considered on appeal. p. 394.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by the Central Bank of West Lebanon against William O. Martin. From a judgment for defendant, the plaintiff appeals. *Reversed.*



*C. R. Pollard and Rabb, Mahoney & Fansler, for appellant.*

*Benjamin F. Long, Charles E. Yarlott, Paul M. Souder, George W. Julien and L. D. Boyd, for appellee.*

This action was instituted by appellant against appellee to recover on a promissory note. It is averred in the complaint that Martin executed his promissory note to the Columbia Casualty Company, by the terms of which he promised to pay to the order of said company, at Farmers and Merchants Bank, of Logansport, Indiana, the sum of \$500, with interest and attorney's fees, and that the Columbia Casualty Company indorsed said note to the plaintiff.

Defendant answered in thirteen paragraphs, the first being a general denial.

Plaintiff demurred to all paragraphs of answers except 1, 3, 4 and 8. The demurrer was sustained to paragraphs 2 and 11, and overruled as to others. Plaintiff replied to all said affirmative paragraphs, which did not go out on demurrer, excepting the tenth. On defendant's motion the court ordered plaintiff to reply to the tenth. Plaintiff refused to comply with the order, and thereupon judgment was rendered against plaintiff on its refusal to plead further.

The errors assigned challenge the ruling on the demurrers to the sixth, seventh, tenth and thirteenth paragraphs of answer.

The tenth paragraph of answer is in the following language: "For a tenth and further paragraph of answer herein, defendant says that the Columbia Casualty Company, to which the note sued on herein was given, was at said time a pretended corporation, purporting to be organized under the laws of the State

of Indiana, relating to corporations organized for the purpose of writing policies of health, accident and casualty insurance. That the note sued on was given by defendant to said Columbia Casualty Company in payment for certain shares of the capital stock of said Columbia Casualty Company which were thereafter to be issued. That within a few days after the execution and delivery of said note by defendant to the Columbia Casualty Company, said Columbia Casualty Company made an arrangement and agreement with plaintiff herein to transfer, assign and exchange said note for a certificate of deposit of said bank, bearing no interest, and becoming due and payable after the maturity of said note. That the assignment, endorsement and transfer of said note to the plaintiff herein as alleged in plaintiff's complaint, was made pursuant to the aforesaid arrangement and agreement between plaintiff and said Columbia Casualty Company. That by said exchange of said note for said certificate of deposit of said bank said Columbia Casualty Company was attempting to invest its funds in said certificate of deposit and so notified said plaintiff at said time, and plaintiff at the time of exchanging its said certificate of deposit for said note knew and understood that said Columbia Casualty Company was making an investment of its funds in said certificate.

“That plaintiff at said time well knew and understood the purpose for which said Columbia Casualty Company was organized or pretended to be organized, and knew and understood that under the statutes of the State of Indiana, relating to such corporations, no such investment of its funds was authorized to be made, and knew that such investment was wholly unauthorized and illegal.

“Defendant further says that said Columbia Casualty Company at said time had no power or authority of any kind or character to transfer, endorse or assign said note in the manner done as aforesaid. That it had no right, power or authority to invest any of its funds or property in a certificate of deposit or certificates of deposit of said plaintiff. That said Columbia Casualty Company had no right, authority or power at said time or at any time to endorse, transfer or assign said note for the consideration, upon the terms and conditions hereinbefore set out and which were the terms and conditions upon which said transfer was made. That said Columbia Casualty Company received no other consideration whatever for the transfer of said note, except said certificate of deposit, as hereinbefore set out. That said endorsement, assignment and transfer of said note so made, was wholly void and plaintiff thereby acquired no right, title or interest of any kind or character in and to said note, and now has no right, title or interest of any kind therein.”

DAUSMAN, J.—Appellee has informed this court that: “The theory of the 10th paragraph of answer is that the trading of the note in question to appellant by Columbia Casualty Co. for a certificate of deposit of appellant was an unlawful investment of the capital stock of that corporation.”

In support of his theory appellee contends that the transaction was unlawful because in contravention of §4769 Burns 1914, Acts 1909 p. 281, which pre-

1. scribes how casualty companies shall invest the money received from the sale of their capital stock. But there is nothing in the statute which prohibits these companies from depositing any of their

funds in banks, and taking therefor certificates of deposit payable either on demand or on a day specified, until such time as investments in accordance with the statute may be made. There is nothing in this paragraph of answer which conclusively fixes the character of the transaction as an investment in contradistinction to a deposit. The averments of this paragraph may be true, and yet, in contemplation of law, the transaction may have been nothing other than the making and receiving of a deposit. The essential nature of the transaction is not altered by merely characterizing it as an attempt "to invest its funds in said certificate of deposit." With as much reason it may be said that every deposit evidenced by a certificate issued by a bank is an investment in the certificate.

Furthermore, if the company should

2. actually invest money received from the sale of capital stock in securities other than those named in the statute, such conduct would be wrongful, but the transaction would not be void. At the utmost it would only be voidable. In that event appellee might find in a court of equity a way to protect his rights as a stockholder; but he cannot do so in this action. *Wright v. Hughes* (1889), 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412. Assuming that the casualty company is a corporation, the statute does not undertake to prohibit it from transferring its commercial paper, and the consequences of an assignment of commercial paper by a corporation are no different than they would be in the case of a natural person. 10 Cyc 1121.

(2) Appellee contends also that the assignment of the note is void because the casualty company is a

“pretended” corporation, and in support there-

3. of directs our attention to §4045 Burns 1914, Acts 1895 p. 255. This contention is not in harmony with the acknowledged theory of the pleading. Nevertheless it is our duty to consider it; for, if the pleading be good on any theory, it would have been error to have sustained the demurrer. But the difficulty with this contention is that there is no averment in the pleading on which it can rest. Appellee relies primarily on the word “pretended” as a foundation for this contention. But what is the effect of the adjective “pretended”? The significance of the word is so vague and ambiguous that it does not inform either the court or the adversary party of any specific thing on which appellee relies for a defense. Does he mean that the casualty company is not a *de jure* corporation? Still it may be a *de facto* corporation. But whether it be a *de jure* corporation or a *de facto* corporation or no corporation at all depends on the facts, and the failure to disclose the facts is fatal. The word “pretended” can have no weight whatever as against the averment that the company purports to have been organized under the statute.

Finally, we come to the bald averment that the casualty company had no power to assign the note.

Clearly this averment states a proposition of

5. law, for the powers of a corporation are determined by the law. Even under the lax provisions of §343a Burns 1914, Acts 1913 p. 850,

6. (if said section be constitutional), it is not permissible to plead a proposition or a conclusion of law. From time immemorial it has been the function of the pleadings to disclose the facts constituting

the cause of action or the ground of defense. It is a trite observation that when making up issues the court must look to the pleadings for the facts, and must look to the books for the law. Chitty, Pleadings chs. 3, 6; 31 Cyc 49. Our Code of civil procedure provides that the complaint shall contain a statement of the facts constituting the cause of action; that the defendant may demur to the complaint on the ground that it does not state facts sufficient to constitute a cause of action; that the plaintiff may demur to the answer on the ground that it does not state facts sufficient to constitute a cause of defense; and that the defendant may demur to any paragraph of the reply on the ground that it does not state facts sufficient to avoid the paragraph of answer. It clearly appears that the theory of the Code is that the pleadings shall deal only with facts. It must be presumed that by enacting said §343a, *supra*, the legislature did not intend to abrogate the other provisions of the Code, but did intend that said section should be construed so as to harmonize as nearly as may be with the established fundamental rules of pleading. We hold, therefore, that the provision of said section which authorizes the pleading of a conclusion, subject only to a motion to make more specific, means a conclusion of fact, and that it does not warrant the pleading of a pure proposition or conclusion of law.

The demurrer to the tenth paragraph of answer should have been sustained.

We cannot consider the other assignments of

7. error for the reason that they are not involved in the judgment rendered.

The judgment is reversed; and the trial court is directed to sustain the demurrer to the tenth paragraph of answer.

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ZOLLMAN v. BALTIMORE AND OHIO SOUTHWESTERN  
RAILROAD COMPANY.

[No. 9,269. Filed December 11, 1918. Rehearing denied March 27, 1919. Transfer denied June 5, 1919.]

1. *APPEAL.—Review.—Judgment.—Exceptions.—Necessity.*—Where the verdict was in general terms in favor of defendant, judgment that plaintiff take nothing, and that defendant recover costs, would follow as a matter of course, and no exception to the judgment was required in order that plaintiff be protected in his rights. p. 399.
2. *APPEAL.—Review.—Judgment.—Exceptions.—Necessity.*—Where the judgment is proper in form and in substance as measured by the verdict or finding, the question of its correctness, as measured by the cause and procedure, is tested by exceptions reserved to rulings preceding the rendering of judgment, and properly presented. p. 399.
3. *APPEAL.—Scope of Review.—Questions Not Necessary to Decision.*—Where appellant did not avail himself of extended time granted on application under §661 Burns 1914, Acts 1911 p. 193, for filing bill of exceptions, the sufficiency of the notice of the hearing on the application or service thereof need not be determined on appeal. p. 401.
4. *APPEAL.—Record.—Bill of Exceptions.—Time for Filing.*—Where a bill of exceptions containing the evidence discloses that it was presented to the judge within the ninety days allowed for filing, that is sufficient, although the bill was not filed until after the expiration of the ninety days. p. 401.
5. *APPEAL.—Record.—Bill of Exceptions.—Conclusiveness.*—A vacation entry that the bill of exceptions containing the evidence was presented to the judge on a certain day is controlled by a recital in the bill that it was presented at an earlier day, there having been no steps taken to correct the error, if any, in the bill. p. 402.
6. *APPEAL.—Record.—Instructions.—Filing.—Bill of Exceptions.*—Where a bill of exceptions discloses that it is proper in form and substance, and that it contains all the instructions that were tendered and refused, etc., and it appears from an order-book entry that the bill was filed on the day that the trial closed, the filing of the bill was a sufficient filing of the instructions to make them part of the record. p. 402.

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7. **APPEAL.—Bill of Exceptions.—Time of Signing and Filing.—Presumption.**—Although it is essential to the validity of a bill of exceptions that it be filed after, rather than before, it has been signed, yet where it appears that there was no default respecting the time of filing and that the bill was filed on the day it was signed, the latter act is presumed to have preceded the former. p. 403.
8. **APPEAL.—Instructions.—Incorporating in Record.—Method.**—The various other statutory methods of making instructions a part of the record in a civil action are not exclusive of the method by bill of exceptions. p. 403.
9. **APPEAL.—Scope of Review.—Questions Not Necessary to Decision.**—The instructions being properly in the record, it is not necessary for the court on appeal to determine whether they were made part of the record by other methods attempted, or whether the statute was complied with in that respect. p. 403.
10. **APPEAL.—Briefs.—Questions Presented.—Motion for New Trial.**—Questions raised under the motion for new trial will be considered on appeal, although the motion is not set out in full in appellant's brief, where the substance of the grounds relied on is set out. p. 403.
11. **APPEAL.—Briefs.—Sufficiency.**—Where appellant's briefs, regardless of criticism respecting form and substance, are sufficient to present a number of questions on the merits of the case, such questions will be considered. p. 404.
12. **WATERS AND WATERCOURSES.—Natural Watercourse.—Obstructing.—Liability.**—Waters in the low-water channel, waters heaped about them, and waters that overspread the high-water channel, are, when flowing down stream in one uniform and continuous current, where unobstructed by the act of man, the waters of a natural watercourse, and liability for obstructing the flow thereof must be determined from a consideration of the law governing the obstruction of a stream rather than that governing in the case of mere surface water. p. 407.
13. **RAILROADS.—Obstruction of Stream.—Liability.—Instruction.—Unusual and Extraordinary Flood.**—In an action against a railroad for unlawfully obstructing the flood waters of a river, an instruction that plaintiff could not recover, if the damage was caused by a flood which was unusual and extraordinary, was erroneous, since, by reason of the comprehensiveness and flexibility in meaning of the terms "extraordinary" and "unusual," the use of such words unqualified and unexplained outlined a defense broader than the law recognizes. p. 410.
14. **RAILROADS.—Obstruction of Stream.—Unusual and Extraordinary Flood.—Liability.**—In an action against a railroad for neg-



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- ligently and unlawfully obstructing the flood waters of a river, although the flood that concurred with defendant's acts was unusual and extraordinary in nature, defendant is liable if the concurrence of the flood might have been anticipated by the exercise of reasonable skill and foresight. p. 410.
15. RAILROADS.—*Obstruction of Stream.—Unprecedented Flood.—Liability.*—The mere fact that a flood is unprecedented cannot be said, as a matter of law, to form the basis of an escape from liability by one negligently and unlawfully obstructing a stream. p. 411.
16. WATERS AND WATERCOURSES.—*Unprecedented Flood.*—A flood is unprecedented if it is somewhat higher or more destructive than any preceding flood. p. 411.
17. WATERS AND WATERCOURSES.—*Obstruction of Stream.—Care Required.*—Due care on the part of one obstructing a stream requires that he take notice of the character of the country and that, in view thereof, he provide ample accommodation for the free passage of water at all seasons of the year. p. 412.
18. WATERS AND WATERCOURSES.—*Obstructing Stream.—Care Required.*—One obstructing a stream is required to take notice of the effect of improvements such as the clearing of lands of forests and constructing artificial drainage. p. 412.
19. RAILROADS.—*Obstructing Stream.—Liability.—Unexpected Flood.—Instruction.*—In an action against a railroad for negligently and unlawfully obstructing the flood waters of a stream, an instruction that plaintiff could not recover if the flood was "unexpected" was erroneous, where the word "unexpected" was used without being in any manner qualified. p. 412.
20. APPEAL.—*Briefs.—Sufficiency.—Failure to Include All Instructions.—Duty of Appellee.*—Appellant is required to set out in his brief only the instructions with respect to the giving or refusal of which he complains, and if the alleged errors therein are obviated by other instructions given, it is the duty of appellee to bring that fact to the court's attention. p. 413.
21. RAILROADS.—*Obstruction of Stream.—Liability.—Instruction.*—In an action against a railroad for negligent and illegal obstruction of the flood waters of a stream, an instruction that, if plaintiff's damages were caused in some other way than by obstructions which defendant placed in the natural channel of the river, or that by the manner in which it erected its trestles on its right of way, plaintiff could not recover, held erroneous as being somewhat obscure when considered in the light of the complaint and evidence and too narrow when measured by the allegations and proof. p. 413.

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22. **RAILROADS.—Obstruction of Stream.—Liability.—Instruction.**—In an action against a railroad for negligently and illegally obstructing the flood waters of a stream, an instruction "that defendant is not liable for the act of God, and by act of God is meant not only natural accidents such as lightning, earthquakes and tempests," but also all other unavoidable and inevitable accidents, was both erroneous and harmful, where under the facts of the case defendant might be liable for the damages caused by the waters of a flood, the language used in the instruction being such as to lead the jury to understand that floods were included in the term "act of God." p. 414.
23. **WATERS AND WATERCOURSES.—Obstruction of Stream.—Liability.—"Act of God."**—In its relation to resulting damages a flood is classed as an act of God in a legal sense, with the consequent immunity of man from liability, only in the absence of human agency wrongfully or negligently contributing to produce the injury of which complaint is made. p. 415.
24. **WATERS AND WATERCOURSES.—Obstruction of Stream.—Liability.**—Where injury resulting from a flood is to some extent the result of the wrongful or negligent participation of man, the consequences are regarded as exclusively of human origin so far as concerns the question of liability, and the situation is removed from the scope of the rules that govern in case of the acts of God. p. 415.
25. **NEGLIGENCE.—Injury Involving Act of God.—Intervention of Human Agency.—Proximate Cause.**—Where an act of God is involved in damage to person or property, but a human agency negligently applied intervenes to produce the injury, the act of God is regarded as the remote rather than the immediate cause of the injury, and recourse cannot be had to it as a legal excuse. p. 415.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by George W. Zollman against the Baltimore and Ohio Southwestern Railroad Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

*Joseph E. Henley, Rufus H. East and Simpson B. Lowe*, for appellant.

*Robert W. Miers, Edward Barton and McMullen & McMullen*, for appellee.

CALDWELL, J.—Appellant is the owner of a 284-acre farm situate immediately east of the town of Medora, in Jackson county, through which, on an embankment, appellee's railroad extends in a general direction of southwest and northeast, and so that the major portion of the farm is south of the railroad. South of the railroad and roughly paralleling it flows White river in a southwesterly direction. At the time of the flood of 1913 appellee's embankment broke, and as a consequence large quantities of water impounded on the north side thereof were suddenly discharged upon appellant's lands south of the railroad. As a result his lands were damaged, and certain personal property injured and destroyed. Averring that appellee had negligently and unlawfully obstructed the flood waters of White river to his injury as alleged, he brought this action to recover the consequent damages. A trial resulted in a verdict in favor of appellee, on which judgment was rendered.

Before considering the cause on its merits, there are certain preliminary questions that must be determined. Thus, no exception was reserved to the

1. judgment. The verdict was in general terms in favor of appellee. On the verdict judgment was rendered that appellant take nothing, and that appellee recover costs. Such judgment follows such a verdict as matter of course. Strictly speaking it involves no ruling, and consequently requires no exception in order that the losing party may be protected in his rights. Where the judgment is

2. proper in form and in substance, as measured by the verdict or finding, the question of its correctness, as measured by the cause and the procedure, is tested by exceptions reserved to rulings pre-

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ceding the rendering of judgment and properly presented. Elliott, App. Proc. §796; *Eckhart v. Marion, etc., Traction Co.* (1915), 59 Ind. App. 217, 109 N. E. 224; *State v. Swarts* (1857), 9 Ind. 221; *Duzan, Admx., v. Myers* (1903), 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. 341; *Smith v. Tate* (1903), 30 Ind. App. 367, 66 N. E. 88.

The validity of §661 Burns 1914, Acts 1911 p. 193, is challenged. That question has in effect been determined. Appellee concedes as much in its brief. *Cleveland, etc., R. Co. v. Smith* (1912), 177 Ind. 524, 97 N. E. 164; *Tarnowski v. Lake Shore, etc., R. Co.* (1914), 181 Ind. 202, 104 N. E. 16.

Under that section appellant obtained an extension of time within which to file his bill of exceptions containing the evidence, beyond the time limited by the court for that purpose when the appeal was prayed and granted. It is urged that such extension was unauthorized by reason of defective notice to appellee, and that as a consequence the bill was not filed within the time properly fixed for that purpose, and that as a result it is not a part of the record. The facts are as follows: The motion for a new trial was overruled and judgment rendered November 9, 1914, at the October term of the trial court, and ninety days given within which to file the bill of exceptions containing the evidence. February 2, 1915, at a succeeding term of the court, appellant, proceeding under §661, *supra*, applied for and was granted an extension of such time to April 1, 1915. That section contains a provision to the effect that the party asking such an extension of time shall give the opposite party, or his attorney of record, at least three days' notice of the time when, and the place where, the application will be heard.

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Filed with the verified application there was a copy of notice sufficient in form and substance and directed to appellee's attorneys of record, and attached to which there was an affidavit to the effect that six days prior to February 2, 1915, the day fixed for presenting the application, one of appellant's attorneys inclosed the original of such notice in an envelope properly stamped and addressed to appellee's said attorneys at Aurora, Indiana, and deposited it so stamped and addressed in the United States mail. Appellee presents the question of the sufficiency of a notice under such statute where there is no service of it otherwise than as indicated. For reasons hereinafter appearing we do not find it necessary to determine such question, but by reason of its importance we suggest the insufficiency of a notice so served, where the service is not accepted as such. See the following: §§504, 505 Burns 1914, §§481, 482 R. S. 1881; *Chicago, etc., R. Co. v. Sanders* (1917), 63 Ind. App. 586, 114 N. E. 986; *Haj v. American Bottle Co.* (1914), 261 Ill. 362, 103 N. E. 1000; *Scanlon v. Scanlon* (1912), 154 Iowa 748, 135 N. W. 634; *North Coast Fire Ins. Co. v. Lincoln County* (1914), 81 Wash. 311, 142 Pac. 661; *Matter of Blumberg* (1912), 149 App. Div. 303, 133 N. Y. Supp. 774; *Ensley v. State* (1910), 4 Okla. Cr. 49, 109 Pac. 250; *Rathbun v. Acker* (1854), 18 Barb. (N. Y.) 393; *Wilson v. Trenton* (1891), 53 N. J. Law 645, 23 Atl. 278, 16 L. R. A. 200; 29 Cyc. 1117, 1119.

As we have said, we are not required to determine the sufficiency of the notice or its service here. The bill itself discloses that it was presented to the judge on February 5, 1915, within the time originally granted. This is sufficient, although

the bill was not filed until March 17. §660 Burns 1914, §629 R. S. 1881; *Malott v. Central Trust Co.* (1907), 168 Ind. 428, 79 N. E. 369, 11 Ann. Cas. 879.

There is a vacation entry to the effect that the bill was presented to the judge on March 5, instead of February 5, but the bill controls in this respect.

5. *Malott v. Central Trust Co., supra.* It may be said also that there are some indications outside the bill that the date of presentation stated in the bill is erroneous. If so, no steps have been taken to correct the bill, and it must therefore govern as to the date of presentation. It results that, as recourse was not had to the extended time, irregularities or insufficiencies attending the procedure to procure the extension are immaterial.

We proceed to consider the various arguments advanced by appellee in support of its contention that the instructions are not in the record. The in-

6. structions were brought into the record by a bill of exceptions. An inspection of the bill discloses that it is proper in form and substance, and that it contains all the instructions that were given and all that were tendered and refused, and that appellant reserved an exception to each instruction given by the court on its own motion and at appellee's request, and a like exception to the refusal of each instruction tendered by appellant and not given. It appears from an order-book entry that the bill was filed on the day that the trial closed and consequently within the term at which the trial was had. The filing of the bill was a sufficient filing of the instructions. *Ohio, etc., R. Co. v. Dunn* (1894), 138 Ind. 18, 36 N. E. 702, 37 N. E. 546.

It appears also that the bill was signed on the day

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that it was filed, it not appearing expressly whether the signing preceded the filing. It is true that

7. it is essential to the validity of a bill of exceptions that it be filed after rather than before it has been signed. But where, as is the case here, it appears that there was no default respecting the time of filing the bill and that it was filed on the day it was signed, the latter act is presumed to have preceded the former. Giving force to such presumption, it is sufficiently disclosed that the bill was signed before it was filed. *Martin v. State* (1897), 148 Ind. 519, 47 N. E. 930; *Toledo, etc., R. Co. v. Parks* (1904), 163 Ind. 592, 72 N. E. 636; *Davis v. Neighbors* (1905), 34 Ind. App. 441, 73 N. E. 151.

The various other statutory methods of making instructions a part of the record in a civil action are not exclusive of the method by bill of excep-

8. tions. *Berry v. Driver* (1906), 167 Ind. 127, 76 N. E. 967; *Republic Iron, etc., Co. v. Lulu* (1911), 48 Ind. App. 271, 92 N. E. 993.

The instructions being properly in the record by bill of exceptions, it is not necessary that we determine whether that end was accomplished by

9. other methods also attempted, or whether the statute was complied with in that respect.

Appellee insists that questions raised under the motion for a new trial should not be considered for the reason that the motion is not set out in full

10. in appellant's brief. The substance of those grounds on which appellant relies is set out. This is sufficient. There is no substantial reason why an appellant should encumber his brief with causes for a new trial waived or not relied on in this court.

Certain other criticisms are made respecting the

form and substance of appellant's briefs. The briefs are sufficient to present a number of questions

11. on the merits of the case. Those questions are therefore entitled to consideration. *North v. Jones* (1913), 53 Ind. App. 203, 100 N. E. 84. It may be said, however, that appellee's briefs, except certain general and unapplied propositions, are devoted exclusively to objections to the sufficiency of the transcript and to criticism of appellant's briefs. Appellee's briefs under points and authorities do not contain a single specific proposition directed to any alleged error urged upon our attention by appellant.

An understanding of the general nature of the complaint is essential to a proper consideration of questions presented involving the merits of the cause. The complaint is in two paragraphs. The first paragraph is briefly to the following effect: The general direction of White river through Jackson county is southwest. It flows near the center of a low flat plain about three miles wide flanked by hills on either side. This plain is the flood or high water channel of the river. Appellant's 284-acre farm lies in this plain, its south line being about a quarter of a mile north of the river. The river overflows its ordinary channel one or more times each year, and in each generation there occur from five to ten floods that cover the entire plain. Appellee's railroad extends through the county near the river, and in the same general direction. The railroad passes through appellant's farm, and so that about thirty-five acres of the latter in its northwest corner are north of the former. About three miles east of the farm, at a point where the course of the river is south, the railroad crosses its ordinary channel at right angles, on a bridge. East



of this point the railroad is south of the river; to the west it is north of the river. The railroad crosses the plain diagonally, emerging from the southern hills a number of miles east of the farm and east of where it crosses the river, and passing into the north line of bordering hills several miles west of the farm. The railroad crosses the flood plain on an artificial embankment ranging from three to fifteen feet high with trestle work at intervals. Except for such trestle work, the bridge and an occasional culvert, the embankment extends southwesterly in an unbroken line from bordering hills to bordering hills. From time to time and after floods and between successive floods appellee has built the embankment higher and reduced the trestle work in number and in length. Likewise the bridge by which the railroad crosses the river has been rebuilt several times, additional piers having been erected for that purpose in the low-water channel. In rebuilding the bridge, old piers no longer in use, and surrounded by grouting covering several hundred square feet of the ordinary bed of the river, were left standing. Formerly there was open trestle work in the embankment east of the river, but prior to the grievances complained of such trestle work had been removed and the embankment built solid from the east end of the bridge to the hills.

The following acts of omission are charged and characterized as negligence: That the supporting timbers and piling of the trestle work were bound together in clusters, and placed so as to obstruct unnecessarily the passage of the water, and so as to cause a collection of drift and debris which further prevented the passage of water; that an unnecessary number of piers were built under the bridge, and said

old piers were permitted to remain, whereby the free flowage of water was prevented, large quantities of drift permitted to accumulate, and a large sand bar caused to form, by reason of which the low-water channel was greatly obstructed; that the embankment was constructed and maintained with insufficient trestle work and openings; that the embankment was raised from time to time as above stated, and adequate openings for the passage of water were not constructed or left, and thereby the capacity of the embankment to pond water on the upper side was increased, and that the embankment was constructed and maintained of light material easily washed away. All these acts and omissions are characterized as having been negligently done and omitted.

There are allegations also grounded on clause 5, §5195 Burns 1914, §3903 R. S. 1881, which empowers a railroad company to construct its road across any stream or watercourse in such manner as to afford security for life and property, but which requires that any such company shall restore the stream or watercourse so crossed to its former state, or in sufficient manner as not to unnecessarily impair its usefulness or injure its franchises.

It is further alleged that in March, 1913, by reason of heavy and continued rains, White river was flooded, and that its waters overflowed its ordinary channel and spread out over the plain that constituted the bed of its high-water channel; that by reason of said embankment with its insufficient and obstructed openings, the water could not, and did not, flow away, but became impounded on the upper side of the embankment at an elevation of several feet above the level of the waters on the lower side; that by reason

of the pressure of the impounded waters, and the material of which the embankment was constructed, the latter broke in several places, some of which were on the railroad right of way on appellant's farm, and that as a result torrents of water swept down onto and over appellant's farm, wearing away the soil, washing great holes in it, and depositing great quantities of drift and debris, to the permanent damage of the land, and that as a further consequence certain of appellant's stock were drowned and others injured. There is a general averment of damages in the sum of \$15,000, for which judgment is asked.

The allegations of the second paragraph are, in the main, similar to those of the first paragraph. The theory of the first paragraph is that the flood waters of White river were a part of the stream, and that such waters, aided by appellee's negligence, caused the damage complained of. The second paragraph proceeds on the theory that the waters that spread over the plain were surface waters which appellee negligently impounded on its right of way, and which it permitted to be suddenly discharged therefrom, to appellant's damage.

There was evidence supporting the averments of fact contained in the complaint in their general scope. Indicating nothing respecting the weight of such evidence, we proceed to the substantial questions presented involving the merits of the cause.

Appellant challenges certain instructions given by the court, among them the nineteenth, twentieth and twenty-ninth. The twentieth instruction was  
12. as follows: "If you find that the injury and damage complained of in plaintiff's complaint was caused by a flood which was unusual, extraordi-

nary and unexpected, the plaintiff cannot recover.” The physical condition to which such instruction must be applied in order that its correctness may be measured, as determined from a consideration of the allegations of the complaint and the evidence adduced in support thereof, is as follows: White river is a stream of water. It has a low-water channel which is a natural watercourse. It has also a flood channel which is a natural high-water course. The river frequently overflows its low-water channel and floods the high-water channel. At such times the waters in the low-water channel and the waters heaped above them and the waters that overspread the high-water channel, when unobstructed by the act of man, flow down stream in one uniform and continuous current. Regardless of what may seem to be the view as indicated by some of the earlier decisions, it is now apparently the settled law of this state that all such waters are the waters of a natural watercourse, and that liability for obstructing the flow thereof must be determined from a consideration of those principles of law that govern in case of the obstruction of a stream rather than in case of mere surface water. See the following, which cite many other cases: *Watts v. Evansville, etc., R. Co.* (1918), (Ind. App.) 120 N. E. 611; *Cleveland, etc., R. Co. v. Woodbury Glass Co.* (1918), (Ind. App.) 120 N. E. 426; *Evansville, etc., R. Co. v. Scott* (1916), 67 Ind. App. 121, 114 N. E. 649; *Vandalia R. Co. v. Yeager* (1915), 60 Ind. App. 118, 110 N. E. 230; *New York, etc., R. Co. v. Hamlet Hay Co.* (1898), 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Northern Ind. Land Co. v. Brown* (1914), 182 Ind. 438, 106 N. E. 706; *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236; *Dunn v. Chicago, etc., R. Co.*

(1917), 63 Ind. App. 553, 114 N. E. 888. See, also, *Fordham v. Northern Pacific R. Co.* (1904), 30 Mont. 421, 76 Pac. 1040, 66 L. R. A. 556, 104 Am. St. 729; *Cairo, etc., R. Co. v. Brevoort* (1894), 62 Fed. 129, 25 L. R. A. 527; *O'Connell v. East Tenn. R. Co.* (1891), 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. 246; *Crawford v. Rambo* (1886), 44 Ohio St. 279, 7 N. E. 429.

Returning to a consideration of instruction No. 20, it was to the effect that appellant could not recover if the flood that caused the damage was unusual, extraordinary and unexpected. "Unusual" is defined as meaning "not frequent, not common, rare, strange." "Extraordinary" is defined as meaning "not of the usual, or customary or regular kind; exceeding the common degree or measure." Century Dictionary. Each of these words is practically synonymous of the other. If a phenomenon is unusual it is out of the ordinary and therefore extraordinary. The applicability of the words "unusual and extraordinary" presupposes the happening of incidents that are usual and ordinary and of other incidents that are exceptional in nature, but that have occurred and that may reasonably be expected to occur again, but which, by reason of their exceptional nature and when measured by that which is common, are designated as "unusual and extraordinary." It is said that the word "extraordinary" does not mean what has never been previously heard of, or within former experience, but only what is beyond the ordinary, the usual, or the common. *The Titania* (1883), 19 Fed. 101. It is said also that the term "unusual" is scarcely strong enough to describe a freshet so outside of ordinary experience that its occurrence was not reasonably

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to be expected. *Broadway Mfg. Co. v. Leavenworth, etc., Bridge Co.* (1910), 81 Kan. 616, 106 Pac. 1034, 28 L. R. A. (N. S.) 156. It is held also that an "unusual flood of rain" does not indicate a greater or more severe rain than has theretofore occurred, but rather such a rain as occurs rarely and not usually. *City of Denver v. Rhodes* (1886), 9 Colo. 554, 13 Pac. 729.

It is our judgment that, to be strictly accurate, the terms "unusual" and "extraordinary" when considered from an etymological standpoint, as well as when measured by popular usage, are both comprehensive and flexible in meaning. They include all occurrences, events and phenomena that are beyond the usual and the ordinary. An incident that has occasionally occurred, although exceptional in nature, may on its reoccurrence be properly characterized as unusual and extraordinary. Also an event the like of which has never previously occurred, and respecting which there is no reasonable ground for expecting it to occur again, may on its occurrence likewise properly be designated as unusual and extraordinary.

It is by reason of the comprehensiveness and flexibility in meaning of the terms under discussion that we are forced to condemn the instruction under

13. consideration. The instruction by the use of such words unqualified and unexplained outlined a defense broader than the law recognizes.
14. In such a case as is presented here the defendant may be liable although the flood that concurred with some act of his was unusual and extraordinary in nature. In such a case the defendant may be held liable in damages not only where

the flood was usual and ordinary in nature, but also where it may be designated as unusual and extraordinary, provided its occurrence might have been anticipated by the exercise of reasonable skill and foresight. *Vandalia R. Co. v. Yeager, supra.*

We believe that the qualifying clause is a correct statement of the real test: If the flood under investigation was of such a nature that, in view of all the facts, the exercise of reasonable skill and foresight should have led to its being anticipated, there may be liability. If it was of such a nature that it could not reasonably have been expected to occur, proper care, diligence and foresight being exercised, there is no liability. Such being the test, the fact that the flood was or was not extraordinary or even unprecedented in nature is of itself and as an independent consideration unimportant. The nature of the flood as usual or unusual, ordinary or extraordinary, is important only as an element in determining whether or not it should have been anticipated.

As we have indicated, we do not believe that the mere fact that the flood was unprecedented can be said, as matter of law, to form the basis of an

15. escape from liability. A flood is unprecedented if it is somewhat higher or somewhat more destructive than any preceding flood. If a flood
16. of a certain water elevation or of a certain destructive force has occurred, it is not unreasonable to anticipate that a like combination of the forces of nature may produce a similar flood. Neither can it be said as a matter of law that some other combination of the forces of nature, aided by topographical and other changes incident to an advancing civilization and the like, may not produce a flood

somewhat greater than any flood that preceded it, and hence the soundness of the rule of reasonable anticipation. We make these observations by reason of the language of certain other instructions. In *Ohio, etc., R. Co. v. Ramey* (1891), 139 Ill. 9, 28 N. E. 1087, 32 Am. St. 176, the Supreme Court of Illinois collects and reviews the decisions to the effect that, in cases similar to the one at bar, the fact that the damages resulted from an extraordinary flood is of itself immaterial in the absence of the qualification that the flood was so great or extraordinary that it could not have been reasonably anticipated. To the same effect is *Gulf, etc., R. Co. v. Pomeroy* (1887), 67 Tex. 498, 3 S. W. 722. In such cases it is incumbent on

17. him who obstructs a stream, in order that he may be found to have exercised due care, that he take notice of the character of the country, and that he provide ample accommodation for the free passage of the water at all seasons of the year, in view of the character of the country. *New York, etc., R. Co. v. Hamlet Hay Co., supra.*

He is also required to take notice of the effect of improvements in the way of clearing the lands of forests and constructing artificial drainage. *Ev-*

18. *ansville, etc., R. Co. v. Scott, supra; Dunn v. Chicago, etc., R. Co., supra; Fordham v. Northern Pacific R. Co., supra.* See, also, *Crawford v. Rambo, supra; Greeley Co. v. Von Trotha* (1910), 48 Colo. 12, 108 Pac. 985; *Bristol Hydraulic Co. v. Boyer, supra; Northern Ind. Land Co. v. Brown, supra.*

It is apparent from what has been said that we cannot approve the use of the word "unexpected" unqualified as in the instruction. Appellee in

19. its brief has called our attention to no instruction supplementing, or given in explanation of,



instruction No. 20. At this point it is proper  
20. to notice appellee's contention that under the rules we are not authorized to consider any question respecting instructions, for the reason that appellant has not set out in his brief all the instructions in full. The rule is otherwise. An appellant is required to set out in his brief only the instructions with respect to the giving or refusal of which he complains. "If the error, with which appellant claims the instructions set out in its brief are impressed, are in any manner obviated or cured by the other instructions given in the case, the duty devolves upon appellees, under rule twenty-two, to call the attention of the court to such fact or facts, citing the court to the pages and lines where the instructions upon which they relied for that purpose might be found." *Simplex, etc., Appliance Co. v. Western, etc., Belting Co.* (1909), 173 Ind. 1, 88 N. E. 682; *Waters v. Indianapolis Traction, etc., Co.* (1916), 185 Ind. 526, 113 N. E. 289.

The nineteenth instruction was in substance that, if the jury should find that appellant's damages were caused in some other way than by obstructions

21. which appellee placed in the natural channel of White river, or than by the manner in which it erected its trestles on its right of way, appellant could not recover, and that the verdict must be for appellee. It seems to us apparent that this instruction is somewhat obscure when considered in the light of the complaint and the evidence, and also that it is too narrow when measured by the allegations and proof. The expression "natural channel" might have been, and probably was, understood by the jury to have reference to the low-water channel, since that is

popularly referred to as the natural channel. Liability, however, as we have seen, might be predicated on damages caused by obstructions placed in either the low-water or the high-water channel, or both. It is at least doubtful whether the instruction is sufficiently broad to include the alleged fact that insufficient openings were left in the embankment, and we believe it to be plain that it does not cover the alleged wrongful and negligent act of constructing and maintaining the embankment of light material easily washed away by water. We believe that it was error to give this instruction. *Cleveland, etc., R. Co. v. Christie* (1912), 178 Ind. 691, 700, 100 N. E. 299; *Kelly Atkinson Constr. Co. v. Munson* (1913), 53 Ind. App. 619, 101 N. E. 510; *Ohio, etc., R. Co. v. Stein* (1894), 140 Ind. 61, 39 N. E. 246.

The twenty-ninth instruction was as follows: "The defendant is not liable for the act of God, and by act of God is meant not only natural accidents such as lightning, earthquakes and tempests, but also it embraces all other unavoidable and inevitable accidents."

We believe that this instruction as applied to the facts of this case was both erroneous and of harmful tendency. While floods are not specifically

22. mentioned, they belong to the same general class as lightning, etc., which are specifically mentioned. Floods, especially when extraordinary in volume and force, are, in a legal sense, embraced by the term "acts of God." It results that, by the general language used, the court must have intended to include floods and the jury must have so understood. Otherwise the instruction was not applicable to the case. The instruction then was to the effect

that appellee was not liable for the consequences of the flood. In such a case as this, however, a defendant may be liable for the damages caused by the waters of a flood. In its relation to resulting

23. damages a flood is classed as an act of God in a legal sense with the consequent immunity of man from liability, only in the absence of human agency wrongfully or negligently contributing to produce the injury complained of. *Cleveland, etc., R. Co. v. Woodbury Glass Co., supra.*

Where the injury complained of is to some extent the result of the wrongful or negligent participation of man, the consequences are regarded as ex-

24. clusively of human origin in so far as concerns the question of liability, and the situation is removed from the scope of the rules that govern in case of the acts of God. *Willson v. Boise City* (1911), 20 Idaho 133, 117 Pac. 115, 36 L. R. A. (N. S.) 1158.

In a case involving an act of God, but where a human agency negligently applied intervenes to produce the injury, the act of God is regarded as the

25. remote rather than the immediate cause of the injury, and recourse cannot be had to it as a legal excuse. *Sproul v. Kellar* (1833), 4 Stew. & P. (Ala.) 382; *New Brunswick Steamboat, etc., Co. v. Tiers* (1853), 24 N. J. Law 697, 64 Am. Dec. 394.

Where lands were damaged by the overflow of waters from a canal, and where the overflow would not have occurred but for the negligent act of the canal owner in permitting a sand bar to form in the canal, the injury cannot be attributed to an act of God. *Chidester v. Consolidated Ditch Co.* (1881), 59 Cal. 197.

In the case at bar, if negligence may not be attrib-

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uted to appellee in failing to anticipate the occurrence of a flood of the nature of the one involved here, if appellee's work as constructed and maintained was reasonably sufficient and proper in view of what should have been anticipated in the exercise of due care, that is, if appellee was guilty of no negligent or wrongful conduct in the premises, then it would appear that the injury to appellant's property resulted from an act of God without the intervention of human agency. But if, in constructing and maintaining the work, negligence in act or omission must be ascribed to appellee, and such negligence intervened to produce the injury, then appellee may not escape liability by appealing to the rules that control in case of an act of God. See 1 C. J. 1174, and notes.

Other questions presented are not considered or decided. Judgment reversed, with instructions to sustain the motion for a new trial.

Dausman, C. J., Batman, P. J., Ibach and Felt, JJ., concur.

Hottel, J., not participating.

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HESS ET AL. v. J. R. WATKINS MEDICAL COMPANY.

[No. 9,901. Filed June 5, 1919.]

1. **PRINCIPAL AND SURETY.**—*Surety.*—*Guarantor.*—*Distinction.*—A surety undertakes to do that which his principal is bound to do, in event the principal fails to comply with his contract, while a guarantor undertakes that the principal will do the things stipulated in the contract by the principal to be done, and, in event the principal fails to perform, that he, the guarantor, will pay whatever damages may be sustained by the beneficiary by reason of such failure of the principal. p. 420.

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2. **PRINCIPAL AND SURETY.**—*Creation of Relation.*—*Contract.*—*Breach.*—*Liability.*—A contract entered into by defendants, in consideration of one dollar paid by plaintiff, and the execution of an agreement by plaintiff company with a vendor of its goods to furnish such vendor merchandise for resale, and to extend the time of payment of an existing indebtedness, to guarantee payment of such sum and of the price of goods to be furnished thereafter, was a contract of suretyship, and not a guaranty, and defendants were liable without notice of vendor's default. p. 422.

From Marshall Circuit Court; *Smith N. Stevens*, Judge.

Action by the J. R. Watkins Medical Company against Lewis J. Hess and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Harley A. Logan*, for appellants.

*L. M. Lauer and John W. Kitch*, for appellee.

ENLOE, J.—This was an action by appellee against the appellants, founded upon a certain contract in writing, entered into by the parties on December 2, 1912.

It appears from the record that for some time prior to said date one H. D. Flora had been selling merchandise furnished to him by appellee, and for which he was, as shown by said agreement, indebted to appellee, on said date, in the sum of \$833.88; that said Flora was desirous of continuing the sale of such merchandise so theretofore furnished him by appellee, and on said date the said appellee and said Flora entered into a contract, by the terms of which said appellee agreed to furnish to said Flora such merchandise as it manufactured, or sold, at whole-sale prices, until March 1, 1914, to be sold by said Flora within the limits of certain described territory; that such goods as should thereafter be furnished by

appellee, and freight or express charges thereon, should be paid for by said Flora, as therein stipulated, unless the time of payment should be extended by appellee, which right is expressly reserved; that the time of payment of the then existing indebtedness of \$833.88 was extended, by the terms of said agreement, so that the same could be paid at any time during the existence of said contract then made.

This contract was duly signed by the appellee and said Flora, and immediately following their signatures was the following:

“In consideration of One Dollar in hand paid by the J. R. Watkins Medical Company, the receipt whereof is hereby acknowledged, and the execution of the foregoing agreement by said company, and the sale and delivery by it to the party of the second part, of its medicine, extracts, and other articles, and the extension of the time of payment of the amount due from him to said company as therein provided, We, the undersigned, do hereby jointly and severally guarantee full and prompt payment of said sum, and for said medicine, extracts and other articles, and the prepaid freight and express thereon, at the time and place, and in the manner in said agreement provided. \* \* \*

“S. J. Hess

“L. G. Harley.”

The complaint was in one paragraph, to which was attached as an exhibit, in its entirety, the aforementioned contract, and to this complaint the appellants first answered severally, in abatement, setting out in their answer, in full, that part of the aforesaid con-

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tract signed by them, and then alleging that said Flora did, at the time said contract was signed, and at the time the amounts named in said contract, which were guaranteed by these defendants, became due, and at the time this suit was commenced against these defendants, and still does, reside in the city of Kokomo, Indiana; that the appellee never brought suit against said Flora, nor attempted to enforce this contract against the principal.

To this answer in abatement a demurrer was sustained, and appellants then answered in three paragraphs—the first, general denial; second, payment; and a third paragraph, which was in substance as follows: “That the appellants guaranteed the payment of the said several amounts sued on in the complaint, and did not promise to pay the same as debtors, on the account sued on, and at the time and times the several amounts became due, the principal, Flora, was solvent, and no notice of the nonpayment of the principal debtor was given to these guarantors by the appellee, or other person, and that thereby these defendants, and each of them were precluded from saving themselves from liability on the guaranty; and said guarantors were thereby damaged and injured to the amount of their liability, by reason of the failure of such notice.

To this paragraph of answer a demurrer was sustained, and thereafter the cause was submitted to the court for trial, which made a general finding in favor of appellee, and that appellants were indebted to appellee in the sum of \$912, and rendered judgment accordingly.

The errors assigned are: Error in sustaining demurrer to answer in abatement; error in sustaining

demurrer to third paragraph of answer; error in overruling appellant's motion for a new trial.

The first and second assigned errors, for their answer, center upon the one question as to the character of the undertaking of appellants, as set

1. forth in said contract. Were they strict guarantors, or were they sureties? A surety undertakes, by his contract, to do that which his principal is bound to do, in case the principal fails to comply with his contract, while a guarantor undertakes that the principal will do the things mentioned in the contract by him (the principal) to be done, and, in case the principal fails in his undertaking, that he (the guarantor) will pay whatever damages may be sustained by the beneficiary in the contract by reason of such failure on the part of such principal.

In the case of *Nading v. McGregor* (1890), 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686, the court said: "In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or in the event he fails, that the guarantor will pay such damages as may result from such failure. It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise. So that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking and not a strict or collateral guaranty. In the latter class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal."



In *Ward v. Wilson* (1885), 100 Ind. 52, 50 Am. Rep. 763, the court said: "In like manner, where the stipulation is to pay the debt or perform the contract of another, absolutely and at all events, whether entered into separately from the other or not, the same effect should, in all cases, be given to such contracts, and the obligor held liable, without notice of default.

\* \* \* No adequate reason occurs to us for stating it as a rule, that a direct, unconditional agreement to pay for goods which may be delivered to a third person in the future, or the same kind of a contract to do any other thing which another has engaged to perform, may, by construction, be made conditional upon a notice of the default of such third person. \* \* \* and if notice of future liability is to be relied on, it should be stipulated for in the writing, rather than that the courts should undertake to annex some condition of liability upon an absolute engagement, \* \* \*."

In *Trustees, etc. v. Gilliford* (1894), 139 Ind. 524, 38 N. E. 404, the court said: "The answer states that the guarantors had no notice or knowledge of a large part of such sales. They had expressly guaranteed 'payment for all sales' which might be made by appellant to William A. Patton. It was their duty either to revoke that guaranty or to see that William A. Patton continued to make payment for the goods purchased."

In *Closson v. Billman* (1904), 161 Ind. 610, 69 N. E. 449, the court said: "Appellant was not a surety, although he joined with the principal obligor in the signing of the bond, because his undertaking was that his principal would perform the contract which was collateral to the bond. \* \* \* Appellant was a

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guarantor, and as such covenanted that his principal would perform the main engagement, or that he (the guarantor) would answer in damages for the default."

Construing the contract in question in the light of the authorities, we hold that the contract in

2. question in this suit was an original undertaking, in the nature of suretyship, and the court did not err in sustaining said demurrers.

Appellants in their motion for a new trial challenges the sufficiency of the evidence to sustain the decision of the court. Construing the contract of the parties as we have, there was ample evidence to sustain the court's decision, and the same was not contrary to law.

Numerous errors in the admission of evidence and in the refusal to suppress the depositions have also been presented. We have carefully examined each and all of them which have been duly presented and find no available error in the record.

The judgment is therefore affirmed.

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INDIANAPOLIS HEAT AND LIGHT COMPANY v. FITZWATER.

[No. 10,276. Filed December 11, 1918. Rehearing denied March 7, 1919. Transfer denied June 5, 1919.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Industrial Board.—Conclusiveness.*—The findings of the Industrial Board must be upheld on appeal unless they are not warranted by the evidence. p. 424.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Employee's Willful Misconduct.—Burden of Proof.*—In a proceeding for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the burden of show-

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ing that the employe's injury resulted from wilful misconduct within §8 of the act is upon the employer. p. 427.

3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Employe's Wilful Misconduct.—Evidence.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for compensation for the death of a lineman electrocuted by coming in contact with a live wire, evidence that decedent was guilty of contributory negligence, and that decedent violated certain rules of the employer which were enforced with little or no diligence and were left largely to the option and discretion of the employes for their enforcement, *held* insufficient to show wilful misconduct on the part of deceased within §8 of the act, it being necessary to show intentional disobedience to a strictly enforced rule to establish wilful misconduct. p. 427.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Industrial Board.—Conclusiveness.*—There being substantial evidence sufficient to support the facts found by the Industrial Board, such finding must stand. p. 428.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Mabel Fitzwater against the Indianapolis Heat and Light Company. From an award for applicant, the defendant appeals. *Affirmed.*

*Elmer E. Stevenson*, for appellant.

*Frank A. Bruce*, for appellee.

IBACH, J.—Quincy Fitzwater was killed in an industrial accident on August 30, 1917, while he was in the employ of appellant as a lineman, at an average weekly wage of \$19.72.

It appears that decedent was engaged in removing some heavy copper wires from appellant's poles and crossarms, and replacing them with lighter wires. On the day that he was killed he had gone to the south end of a line of poles on Meridian street, climbed one of the poles, fastened "a rope hand line" to one end of the large copper wire, then cut such wire near

where he had fastened the rope. He then dropped the wire and rope to the ground and descended the pole. He was either preparing to place tape around the rope where it was fastened to the wire, or was actually engaged in so doing, so that the severed wire could be guided over the crossarms, when in some manner such wire became charged with electric current and conveyed into his body, causing his death.

The application for compensation filed by appellee, decedent's widow, before the Industrial Board was in the usual form. The evidence was finally heard by the full board, and an award made granting to the petitioner compensation for 300 weeks at the rate of \$10.86 per week, together with burial expenses not exceeding \$100.

It is from this award that appellant appeals, and contends the uncontradicted evidence shows that decedent met his death by reason of his wilful misconduct and wilful failure to use safety appliances and his wilful failure to obey its orders and rules and to take the precautions required of him by law, and therefore, under §8 of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), it was error to award any compensation. In other words, it is insisted that the conduct of the decedent under all the facts and circumstances of the case amounted in law to wilful misconduct as defined in §8, *supra*, and therefore the award made by the Industrial Board was not sustained by the evidence, and is contrary to law.

The findings of the Industrial Board are

1. against the contention, and must be upheld by this court unless such findings are not warranted by the evidence.

In addition to the facts already disclosed, it is found: That appellant had actual knowledge of decedent's injury and death at the time of the occurrence; that appellant duly executed a report thereof to the Industrial board and filed the same in proper time, and that appellee was decedent's wife, and was living with him at the time of his death. At the time of decedent's death and for a long time prior thereto appellant had in force certain written rules relative to the manner in which linemen should perform their work, and a copy of said rules had on different occasions been furnished to decedent long prior to the date he was electrocuted. In a general way the rules provided that all tools would be furnished by appellant to the linemen on application to the storekeeper, except pliers, connectors, climbers, screwdrivers and belts, which tools the linemen were required to own. As to the manner of doing the work and as to the use of safety appliances several rules were adopted. Rule 9 provides: "Never place the line where it can get against a sign, cornice, roof, pole, or anything else where exposed to the weather, unless it would first rest against glass." Rule 13. "\* \* \* It is your orders at all times to do what you do thoroughly." Rule 14. "When working on a circuit keep it 'closed.'" Rule 15. "In working on lines all circuits must at all times be regarded as alive and grounded. With hundreds of miles of wire throughout the city, some of which are carrying heavy currents at all times, many using ground return, the line you are on may 'come alive' at any time—*be careful*." Rule 7. "When working on poles always use your safety belts, as well as other safety devices you are requested to use." Rule 18. "\* \* \* The company demands that you

take necessary time and precaution for your own protection at all times." Rule 20. "The company will furnish rubber gloves and insulating stools which you are commanded to use at all times. Don't neglect this." Rule 21. "Do not depend upon insulated wire for safety. Insulation of high-tension aerial wires is impossible." The rubber gloves provided by defendant did not cover the arms of the workmen above the wrist joint. If decedent had had on a pair of the gloves at the time of his injury they would not have prevented his injury and death. Up to the time of decedent's death the extent to which, and the manner in which, the safety appliances provided by the defendant and described in its rules were to be used were left almost entirely to the discretion of the particular workman. The rubber shield had not up to that time been used extensively and was not regarded by the foreman under whom decedent was working at the time as an efficient safety device. "That the evidence does not show and the board cannot find that the use of the safety devices provided by the defendant and described in its rules would have prevented the injury and death of decedent; that the exact manner in which the live wire came in contact with the arm of decedent is not shown by the evidence; that his injury and death was not due to any wilful misconduct upon his part or to any wilful disobedience of the rules of the defendant, or to any wilful failure to use any safety device provided by it; that defendant's foreman under whom decedent was working had not given him any specific instructions as to the manner in which he should detach the wire on August 30, 1917, and had not given him any specific instructions as to compliance with any of the rules of defendant, or as

to the use of any safety device whatever, but had left to the discretion of decedent the determination of the manner of doing said work and also the determination and advisability of using safety devices and the manner of their use; that the injury resulting in the death of decedent was due to an injury by accident arising out of and in the course of his employment with the defendant."

As we have said, the determination of the controversy in this case depends entirely on whether the injury and death of decedent was caused by his

2. own wilful misconduct, and the burden of showing this fact rested upon appellant. It has been repeatedly held that "wilful misconduct" means something different from and more than negligence, however great; it involves conduct of a quasi criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard to its probable consequences. *Haskell, etc., Car Co. v. Kay* (1919), 65 Ind. App. 545, 119 N. E. 811.

It may be conceded that the evidence shows decedent to have been guilty of contributory negligence in doing the particular work required of him,

3. that is to say, he did not exercise that degree of care which the conditions and circumstances called for; but negligence does not prevent compensation. And it might be said that there was some evidence before the board which would justify the inference that decedent was guilty of an infraction of certain rules of appellant company which were enforced with little or no diligence and were left largely to the option and discretion of its employes for their enforcement, but this falls far short of wil-

ful misconduct as intended and contemplated by the statute, *supra*. There must be shown an intentional disobedience to a strictly enforced rule to support the defense of wilful misconduct.

The evidence, however, taken as a whole, supports the finding of the Industrial Board, and does not warrant the holding on our part that the evidence

4. compels the conclusion as a matter of law that decedent met his death by reason of his own wilful misconduct. On the contrary, we are satisfied that there is substantial evidence sufficient in itself to support the facts found by the Industrial Board, and certainly ample evidence which aided by fair inferences fully warrants such findings. This being true, the finding of the Industrial Board must stand.

Award affirmed, with five per cent. damages, as provided by §3 of the amendment to the Workmen's Compensation Act (Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918).

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KRABBE v. CITY OF LAFAYETTE.

[No. 9,928. Filed June 5, 1919.]

1. **APPEAL.—Questions Reviewable.—Briefs.**—Where neither the motion to make the complaint more specific, the complaint itself, nor the demurrer to the complaint or memorandum required to be filed therewith are set out in the appellant's brief, error assigned on the overruling of the motion and demurrer presents no question for review on appeal. p. 430.
2. **APPEAL.—Questions Reviewable.—Briefs.—Failure to Set Out Instructions.**—Where none of the instructions given or refused, of which complaint is made, are set out in appellant's brief, as required by rules of the Appellate Court, no question is presented for review on appeal by error assigned on the giving or refusal of such instructions. p. 431.



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3. **APPEAL.—Briefs.—Waiver of Error.**—Grounds for a new trial are waived by appellant's failure to refer to them in his brief under his statement of points and authorities. p. 431.
4. **TRIAL.—Directing Verdict.—Evidence.**—If there is a conflict in the evidence on any material point, or, if the evidence adduced, there being no conflict therein, is not sufficient legally to support a verdict, it is error for the court to direct a verdict for plaintiff. p. 431.
5. **MUNICIPAL CORPORATIONS.—Officers.—Money Wrongfully Acquired.—Right of City to Recover.**—Where a city authorized the city clerk to employ a deputy and appropriated \$700 for salary, and the deputy received such amount as salary, but, on the clerk's demand, turned over to him the difference between such amount and the salary he stipulated that she should receive when employed, such difference belonged to the city, and it could maintain an action for money had and received for the recovery thereof. pp. 432, 434.
6. **MONEY RECEIVED.—Action.—Grounds.**—The action for money had and received lies whenever one person has money which legally or in equity and good conscience belongs to another. p. 434.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by the city of Lafayette against Albert J. Krabbe. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Arthur D. Cunningham* and *Thomas W. Field*, for appellant.

*E. Burleigh Davidson* and *George P. Haywood*, for appellee.

ENLOE, J.—Action by appellee against appellant for money had and received. The complaint was in two paragraphs, to each of which demurrers were filed and overruled, and appellant answered by general denial.

The issues thus formed were submitted to a jury, which, under instructions from the trial court, returned a verdict in favor of appellee, upon which the court rendered judgment. The appellant's motion for a new trial was overruled, and he duly excepted.

There are eighteen specifications in appellant's assignment of errors, but only the following are proper assignments, and therefore the only ones to be considered, viz.: (1) "The court erred in overruling defendant's motion to make paragraph one (1) of the complaint more specific." (2) "The court erred in overruling defendant's motion to make paragraph two (2) of the complaint more specific." (3) "The court erred in overruling defendant's demurrer to the first and second paragraphs of the complaint and each of them." (18) "The court erred in overruling defendant's motion for a new trial."

As to the first, second and third assignments of error, neither the motion to make the complaint more specific, the complaint itself, nor the demurrer

1. to complaint or memorandum required to be filed therewith, are copied, or set out in the appellant's brief, and we are left entirely to conjecture as to what they or either of them contained, and therefore neither of these assignments present any question for our consideration. *New Albany Nat. Bank v. Brown* (1916), 63 Ind. App. 391, 114 N. E. 486; *Chaney, Admr., v. Wood* (1917), 63 Ind. App. 687, 115 N. E. 333; *Robinson v. Horner* (1916), 62 Ind. App. 456, 113 N. E. 10; *Harrold v. Whistler* (1916), 60 Ind. App. 504, 111 N. E. 79; *Gary, etc., R. Co. v. Hacker* (1915), 58 Ind. App. 618, 108 N. E. 756; *Steel v. Yoder* (1915), 58 Ind. App. 633, 108 N. E. 783; *Haugh v. Haywood* (1919), 69 Ind. App. 286, 121 N. E. 671.

Appellant's motion for a new trial contained sixteen separate specifications, or reasons therefor, of these only the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth are proper reasons to be assigned in such motion. §585 Burns 1914, §559 R. S. 1881.

Of the above specifications, Nos. 4 and 5 relate to the giving of instructions, and Nos. 6, 7, 8, 9 and 10 relate to the refusal of the court to give certain instructions tendered by appellant.

None of the instructions, either of those given or refused, of which complaint is made, are set out in appellant's brief, as required by the rules of this court, and therefore no question is presented for our consideration. *Traylor v. McCormick* (1917), 63 Ind. App. 695, 115 N. E. 346.

The eleventh and twelfth reasons for a new trial are waived by appellant's failure to refer to either of them in his brief, under his "Statement of Points and Citation of Authorities," and they are each therefore waived. *Chicago, etc., R. Co. v. Biddinger* (1916), 63 Ind. App. 30, 113 N. E. 1027.

The third specification in the motion for a new trial challenges the correctness of the action of the court in directing the jury to return a verdict for the plaintiff.

If there was a conflict in the evidence in this case on any material point, or if the evidence adduced, there being no conflict therein, was not sufficient legally to support a verdict, the court erred in directing a verdict.

In the case of *Moore, Exr., v. Baker* (1891), 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. 203, the court said: "Where the evidence clearly establishes the right of the plaintiff to recover without contradiction, and no defense is proven against such right, it is proper for the court to direct a verdict for the plaintiff, but not otherwise." *McCardle v. Aultman Co.* (1903), 31 Ind. App. 63, 67 N. E. 236; 15 Cyc 254.

With the foregoing rules in mind, we will proceed to examine the evidence upon which the verdict in this case rests.

We find from the record that in May, 1905, the appellee city passed an ordinance "authorizing and empowering the city clerk to employ a deputy

5. for his office"; that for the four years, from January, 1910, to January 5, 1914, the appellant was city clerk of appellee city; that on October 3, 1910, appellee passed an appropriation ordinance, for the year 1911, and therein and thereby appropriated for "salary for deputy clerk, when employed \$700.00"; that for the year 1912, appellant, by appropriation ordinance duly passed, appropriated for salary of deputy clerk when employed \$700; that the same amount was also appropriated annually, by ordinance duly passed, for the years 1913 and 1914, for salary for deputy clerk when employed; that one Elizabeth Yonker Reule began working as clerk in the office of the city clerk, under the appellant in June, 1911; that she served continuously thereafter as such deputy during the time appellant was city clerk; that she was hired as such deputy by appellant; that he offered her a salary of eight dollars per week, which she agreed to accept, that she received eight dollars per week for her services as deputy clerk from the beginning of her employment up to January 1, 1913; that during the year of 1913 she received a salary of nine dollars per week; that during the first half of her employment she received her salary weekly, and later was paid monthly; that she was paid by warrant drawn by the city comptroller of appellee city; that during the time she was so employed she drew compensation from appellee city at the rate of \$700 per

year, turning over to appellant the difference between her stipulated salary and the amount received by her from said city; that the appellant demanded of his said deputy that she turn over to him all of the salary drawn in excess of the stipulated weekly wage, telling her that such excess belonged to him; that such was the custom, and former city clerks had received the money that way, and that he was doing it with the council's permission; that appellant had kept all the money thus given to him; that said Elizabeth Yonker Reule never received any written appointment, nor took any oath of office as deputy city clerk; that she supposed the excess over salary which she received from the appellee, by warrant, rightfully belonged to appellant; that she performed the work of deputy clerk while in the office of appellant; that each and all the warrants by which said Elizabeth Yonker Reule was paid were drawn against the appropriation made by appellee for payment of salary of deputy clerk; that the said warrants were drawn by the comptroller of said city at the direction of said appellant.

There is no dispute as to the ultimate facts of this case, but the real contention arises over the application of the law thereto.

The appellant insists that under the facts of this case the money in question is not the money of appellee city; that it either belongs to the girl, Elizabeth Yonker Reule, or to the appellant, and, if it rightfully belongs to either of said parties, this action will not lie. This contention necessitates a consideration of the evidence, that we may determine to whom this money belongs.

The action for "money had and received" lies whenever one person, defendant, has money which

legally, or *in equity and good conscience*, belongs to another, the plaintiff; and, unless the money in question, either legally, or in equity and good conscience, belongs to appellee city, this action cannot be maintained.

Under a fair construction of the evidence in this case, Elizabeth Yonker Reule was hired by appellant to act as a clerk in his office, at a stipulated

5. salary, at the beginning of eight dollars per week. Had this sum, and later the salary of nine dollars per week been paid to her, by warrant of said city duly drawn and paid, no one will for a moment contend that she could have maintained an action against appellee for a balance of salary, the difference between what she thus received and the amount appropriated by appellee to pay such salary. Evidently the money in question did not, and does not, belong to her.

Does it belong to appellant? It most certainly does not. It did not rightfully pass into the hands of the clerk, the stipulated wage agreed upon was all that she could rightfully receive. She had no title or right to this money so paid to her in excess of her stipulated salary, either legal or equitable, and by turning it over to appellant, under such circumstances as disclosed in this record, she could confer no rights therein to him. The time has passed when conduct, on the part of public officials, such as is disclosed in this record, will be allowed to pass unnoticed. Office holders must understand that "*a public office is a public trust, and the official is the trustee thereof for the people.*"

No error has been presented, and the judgment is therefore affirmed.

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McClen v. Sehker—70 Ind. App. 435.

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## McCLEN ET AL. v. SEHKER ET AL.

[No. 9,892. Filed June 5, 1919.]

1. **APPEAL.—Record.—Change of Venue.—Failure to Authenticate Paragraphs of Complaint.—Questions Presented.**—Where, upon a change of venue being taken, the clerk of the court in which the action originated failed to certify or authenticate paragraphs of complaint, they were not in the record, and assignments of error on rulings on motions and demurrers addressed thereto present no questions for review on appeal. p. 436.
2. **WILLS.—Construction.—Use of Words.—“Heirs.”—Rule in Shelley’s Case.**—Where a will uses the word “heirs” in its ordinary legal sense, a fee is vested in the first taker under the rule in Shelley’s case. p. 439.
3. **WILLS.—Construction.—“Heirs.”**—Although the word “heirs,” as used in a will, may mean children, such meaning cannot be ascribed to it unless it very clearly appears that the word was used in that sense. p. 439.
4. **WILLS.—Construction.—Estates Created.—Use of Words.—“Heirs.”**—Superadded words in a will which merely describe or specify the incidents of the estate created by such a word of limitation as “heirs” do not cut down the interest of the devisee. p. 440.
5. **WILLS.—Construction.—Testator’s Intention.**—In construing a will, the court should ascertain and carry out the testator’s intention whenever it can be done without overthrowing a well-established principle of law, but even a clear legal intention of the testator cannot be permitted to contravene the settled rules of law by depriving an estate of any of its essential legal attributes. p. 441.
6. **WILLS.—Construction.—Rule in Shelley’s Case.**—Where land was devised to testator’s son “to be held by him during his natural life only, then to his legal heirs,” with a further provision that the son should not dispose of it, but at his death it should belong to his legal heirs during their life, the son took a fee under the rule in Shelley’s case. p. 444.

From St. Joseph Superior Court; *George Ford*, Judge.

Action by John F. McClen and others against Frank C. Sehker and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

*Darrow & Rowley and McInernys, Yeagley & McVicker*, for appellants.

*H. W. Sallwasser, W. A. McVey and H. B. McLane*, for appellees.

MCMAHAN, J.—This action was commenced by the appellants in the LaPorte Superior Court. The complaint was in three paragraphs. Appellees' motions to strike out parts of the second and third paragraphs were sustained, as were also demurrers to each paragraph. An amended second paragraph of complaint was filed, and then on motion of appellants the cause was venued to the St. Joseph Superior Court.

An amended first paragraph of complaint was filed in the St. Joseph Superior Court. The first, second, third, fourth, seventh and eighth assignments

1. of errors relate to the action of the court in sustaining the motions and demurrers addressed to the second and third paragraphs of complaint. Appellees insist that these paragraphs of complaint, both of which were filed in the LaPorte Superior Court, are not in the record, and that said assignments present no questions for our determination. Neither of said paragraphs of complaint was certified to nor authenticated by the clerk of the LaPorte Superior Court on change of venue. The record in this case is identical with the record in *Consolidated Stone Co. v. Staggs* (1905), 164 Ind. 331, 73 N. E. 695, and on the authority of that case we are forced to hold that the second and third paragraphs of the amended complaint are not in the record.

The amended first paragraph of complaint alleges that John McClen died testate, the owner in fee of the real estate in controversy; that the last will and testament of said McClen was admitted to probate in



the circuit court of LaPorte county in March, 1889; that item No. 2 of said will reads as follows:

“Second. I give, devise and bequeath to my beloved wife, Susannah McClen, and my beloved son, Schuyler F. McClen, all the personal property and real estate I may be seized at the time of my death, to share equal and alike, my son’s share to be held by him during his natural life only, then to his legal heirs and no part of the following real estate to be disposed by him (we omit description). It is my will and intention that my son shall not dispose of any of the above described real estate, but at his death shall belong to his legal heirs during their life.”

It is also alleged that at the date of the execution of said will there were living three children of said Schuyler F. McClen, namely, John F., Anna and Jesse McClen; that there were afterwards born to him a daughter, Elizabeth, and a son, Chester William; that the said children are the sole and only legal heirs of said Schuyler F. McClen, who died intestate in March, 1915; that they are the persons referred to in the said will as the legal heirs of Schuyler F. McClen, and are such heirs, and as such are the owners under the provisions of said will as tenants in common of the undivided one-half of the real estate described, each being the owner of a one-tenth interest therein. That Susannah McClen died intestate in March, 1894, the owner of the real estate so devised to her; that Schuyler F. McClen was the sole and only heir of Susannah, and as such inherited from her the share of said lands devised to her by said will; that in April, 1895, said Schuyler F. Mc-

Ollen made a deed of conveyance to George H. Service, describing all of said lands, and that under the said deed to George H. Service appellee Lahker, by mesne conveyance, is claiming the title to the whole of said real estate; that in 1907 said Lahker executed a mortgage thereon to Hart L. Weaver, who has since died, and that the appellees other than Lahker are the executors of the last will and testament of Hart L. Weaver, and are claiming to hold a mortgage lien upon all of said real estate, and are asking that the title to one-half of said real estate be quieted in appellants, and for partition.

Appellee Lahker filed a separate demurrer to this amended paragraph of complaint, and the other appellees filed a joint demurrer to it. Both of these demurrers were sustained, and appellants excepted, and, refusing to plead further, judgment was rendered accordingly, and against them.

The fifth and sixth errors assigned challenge the ruling of the court sustaining the demurrers to the amended first paragraph of complaint. The only question presented by these assignments is, Did Schuyler F. McClen take an estate for life in an undivided one-half of his father's real estate under item 2 of the will, hereinbefore set out? Does the rule in Shelley's case (1793), 1 Coke 88, apply? If so, the cause must be affirmed; otherwise it must be reversed.

Appellants contend that the language used in the will shows that the intention of the testator was to give to his son Schuyler a life estate and the remainder over to the children of the son; that the words "legal heirs" in the expression "then to his legal heirs" means the children of Schuyler F. McClen born in lawful wedlock.

Where a deed or will uses the word "heirs" and uses it in its ordinary legal sense, a fee is vested in the first taker. This is the effect and force of

2. the rule in Shelley's case, and that rule enters into our law as a rule of property, and in all cases when it is applicable we must enforce it. The word "heirs" when used in a deed or will is one of great power, and its force and effect is not overcome or impaired by the mere use of negative or restraining words. Fearne declares that the "most positive direction" will not defeat the operation of the rule in Shelley's case. 2 Fearne, Remainders §435. While this statement may be too strong under the doctrine of some of the later cases, it is certain that the mere use of negative words cannot restrain or impair the force of the word "heirs." While it is true

3. that the word "heirs" may mean children, it is also true that this meaning cannot be assigned to the word unless it very clearly appears that it was used in that sense. *Ridgeway v. Lanphear* (1885), 99 Ind. 251. Lord Redesdale, in *Jesson v. Wright* (1820), 2 Bligh 1, 57, said: "The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." Lord Denman said: "Technical words or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." *Doe v. Gallini* (1833), 5 Barn. and Adol. 621. "Conjecture, doubt or even equilibrium of apparent intention will not suffice." 2 Redfield, Wills (2d ed.) 67.

Superadded words which merely describe or specify the incidents of the estate created by such a

4. word of limitation as "heirs" do not cut down the interest of the devisee. *Shimer v. Mann* (1885), 99 Ind. 190, 50 Am. Rep. 82.

The Supreme Court in *Allen v. Craft* (1887), 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425, said: "We have no doubt that a clause creating an estate in fee may be so modified by other clauses as to cut down the estate to one for life, but to have this effect the modifying clauses must be as clear and decisive as that which creates the estate. \* \* \* Strong as is the word 'heirs,' it may be read to mean children, if the context decisively shows that it was employed in that sense by the testator. \* \* \* But there must be no doubt as to the intention of the testator to affix to the word 'heirs' a meaning different from that assigned it by law."

In construing a will we should keep in mind that the first taker is the object of the testator's bounty. The will involved in this appeal cannot be compared with those involved in *Granger v. Granger* (1897), 147 Ind. 95, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, and *Conger v. Lowe* (1890), 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165, cited by appellants. Appellants insist that the rule of Shelley's case does not apply for the reason that there are two distinct devises, one to the son Schuyler for life and another to the "legal heirs" of Schuyler.

Appellants say that we must ascertain the intention of the testator, and that this intention must rule and control in carrying out his will, even though the words used by the testator had a different meaning technically than that which was intended by the testator.

However prominent a place in the construction of wills the intention of a testator may have, such intention can never change the law nor take the place

5. of the legal formalities required by law. The court, in construing a will, should aim to ascertain the intention of the testator and to carry out that intention whenever it can be done without overthrowing a well-established principle of law. But "even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of any of its essential legal attributes." *Mulvane v. Rude* (1896), 146 Ind. 476, 45 N. E. 659. See, also, *Teal v. Richardson* (1903), 160 Ind. 119, 66 N. E. 435; *Waters v. Lyon* (1895), 141 Ind. 170, 40 N. E. 662; *Lee v. Lee* (1910), 45 Ind. App. 645, 91 N. E. 507; *Burton v. Carnahan* (1906), 38 Ind. App. 612, 78 N. E. 682; *Chamberlain v. Runkle* (1902), 28 Ind. App. 599, 63 N. E. 486.

As said by the court in *Siceloff v. Redman's Admr.* (1866), 26 Ind. 251, 262: "It would seem apparent that the testator intended that the heirs should take directly from him, as purchasers, and not by descent from the ancestor; yet, by the technical meaning applied to the word heirs, under the rule in *Shelley's* case, this apparent intention is denominated a presumed intent, and is not allowed to control the technical meaning of the word heirs, or in other words, despite the apparent intent of the testator, the rule gives the fee to the ancestor."

As said by the Supreme Court in *Biggs v. McCarty* (1882), 86 Ind. 352, 44 Am. Rep. 320: "It is not always the presumed or actual intention of the testator, but, as contra-distinguished therefrom, his legal intention, that must be enforced. The application of

the rule in Shelley's case sometimes unquestionably defeats the intention and actual purposes of the testator; yet the rule has been so long adhered to in Indiana that it must be regarded as the law here until it is changed by the Legislature."

In *Jordan v. Adams*, 5 Gray, Cases on Property 99, the court said: "When once the donor has used the terms 'heirs,' or 'heirs of the body,' as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular."

A careful study of the Indiana cases discloses that the rule in Shelley's case has been applied in the following cases: *McCray v. Lipp* (1871), 35 Ind. 116; *Andrews v. Spurling* (1871), 35 Ind. 262; *Gonzales v. Barton* (1873), 45 Ind. 295; *Smith, Exr., v. McCormick* (1874), 46 Ind. 135; *King v. Rea* (1877), 56 Ind. 1; *Fletcher v. Fletcher* (1882), 88 Ind. 418; *Shimer v. Mann, supra*; *Hochstedler v. Hochstedler* (1886), 108 Ind. 506, 9 N. E. 467; *Allen v. Craft, supra*; *Taney v. Fahndley* (1890), 126 Ind. 88, 25 N. E. 882; *Lane v. Utz* (1892), 130 Ind. 235, 29 N. E. 772; *Reddick v. Lord* (1892), 131 Ind. 336, 30 N. E. 1085; *Perkins v. McCon-*

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*nell* (1894), 136 Ind. 384, 36 N. E. 121; *Waters v. Lyon, supra*; *Bonner v. Bonner* (1902), 28 Ind. App. 147, 62 N. E. 497; *Chamberlain v. Runkle, supra*; *Teal v. Richardson, supra*; *Lamb v. Medsker* (1905), 35 Ind. App. 662, 74 N. E. 1012; *Burton v. Carnahan, supra*; *Lee v. Lee, supra*; *Newhaus v. Brennan* (1912), 49 Ind. App. 654, 97 N. E. 938; *Gibson v. Brown* (1916), 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894.

The court refused to apply the rule in the following cases for the reason that the facts involved did not inVOKE its application. *Sordem v. Gatewood* (1848), 1 Ind. 107; *Doe v. Jackman* (1854), 5 Ind. 283; *Small v. Howland* (1860), 14 Ind. 592; *Hull v. Beals* (1864), 23 Ind. 25; *Siceloff v. Redman's Admr., supra*; *Prior v. Quackenbush* (1868), 29 Ind. 475; *Nelson v. Davis* (1871), 35 Ind. 474; *Owne v. Cooper* (1874), 46 Ind. 524; *Helm v. Frisbie* (1877), 59 Ind. 526; *Locke v. Barbour* (1878), 62 Ind. 577; *Stilwell v. Knapper* (1880), 69 Ind. 558, 35 Am. Rep. 240; *McMahan v. Newcomer* (1882), 82 Ind. 565; *Biggs v. McCarty, supra*; *Ridgeway v. Lanphear, supra*; *Fountain County Coal, etc., Co. v. Beckleheimer* (1885), 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645; *Hadlock v. Gray* (1885), 104 Ind. 596, 4 N. E. 167; *Millett v. Ford* (1887), 109 Ind. 159, 8 N. E. 917; *Conger v. Lowe, supra*; *Jackson v. Jackson* (1891), 127 Ind. 346, 26 N. E. 897; *Earnhart v. Earnhart* (1891), 127 Ind. 397, 26 N. E. 895, 22 Am. St. 652; *Burns v. Weesner* (1893), 134 Ind. 442, 34 N. E. 10; *McIlhinny v. McIlhinny* (1894), 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. 186; *Granger v. Granger, supra*; *Adams v. Merrill* (1910), 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36.

It is argued that the use of the word "only" in the

phrase, “to be held by him during his natural life only,” means nothing else than a life estate,

6. not more than a life estate. This would doubtless be true were it not followed by the words “then to his legal heirs.” See *Burton v. Carnahan, supra*, where the clause in the will was “to be held by her during her natural life and no longer.” The rule in Shelley’s case has become so firmly established as a rule of property in this state that when a testator makes use of the technical words “heirs” or “heirs of his body,” he is conclusively presumed to have used them in their technical sense, unless it clearly and unequivocally appears otherwise.

We hold that under the will of John McCllen, Schuyler F. McCllen took a fee in one-half of the real estate in controversy, and that there was no error in sustaining the demurrer to the first paragraph of the amended complaint.

Judgment affirmed.

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..      WARTELL v. PETERS HOTEL COMPANY.

[No. 9,881. Filed June 5, 1919.]

1. CHATTEL MORTGAGES.—*Recording.—Computation of Time.—Statute.*—While §1350 Burns 1914, §1280 R. S. 1881, providing that the time in which an act is to be done as provided in the Code shall be computed by excluding the first day and including the last, which shall be excluded if it falls on Sunday, applies only to proceedings in civil cases, yet the method of computation of time therein stated has been established by previous decisions of the appellate courts in this state, and such method is applicable in computing the time in which a chattel mortgage must be recorded. p. 447.
2. ACKNOWLEDGMENT.—*Sufficiency.*—A certificate of acknowledgment of a chattel mortgage is not sufficient to justify the record



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of the instrument, where, in addition to its bad form and failure to state the names of the parties acknowledging, and whether they acknowledged before the officer, it fails to give the state and county in which it was acknowledged or in which the notary had his appointment. p. 450.

From Adams Circuit Court; *David E. Smith*, Judge.

Action by the Peters Hotel Company against Benjamin Wartell. From a judgment for plaintiff, the defendant appeals. *Reversed*.

*Albert E. Thomas* and *Howard L. Townsend*, for appellant.

*Charles M. Niezer*, *Louis F. Crosby* and *James P. Murphy*, for appellee.

NICHOLS, P. J.—This was an action by the appellee against the appellant for trover and conversion commenced in the Allen Circuit Court and thereafter venued to the Adams Circuit Court. The appellee claims title to an automobile by virtue of a chattel mortgage bearing date of November 12, 1914, which was not recorded until November 23, 1914, November 22 being Sunday. The appellant claims title to said automobile by virtue of bill of sale without possession, bearing date of October 21, 1914. Both the chattel mortgage and bill of sale were executed by one Jacobs, who was the owner of said automobile. The complaint was in two paragraphs, the first of which was answered by a general denial. There was a demurrer to the second paragraph, which was overruled, to which ruling the appellant excepted and then filed his answer in general denial to the second paragraph and a special paragraph of answer to both paragraphs of complaint. To this special paragraph of

answer the appellee replied with a general denial. There were special findings of fact by the court, and a conclusion of law and judgment against the appellant for \$163.40. Appellant excepted to the conclusion of law and judgment of the court, and after motion for a new trial, which was overruled, to which ruling the appellant excepted, he now prosecutes this appeal.

The errors relied upon for reversal are: (1) Overruling appellant's demurrer to second paragraph of complaint; (2) error in the conclusion of law upon the special finding of fact.

The questions for consideration in this opinion are: (1) Was the chattel mortgage executed by Jacobs to the appellee on November 12, 1914, and recorded on November 23, 1914, recorded in time? (2) Was the acknowledgment of said chattel mortgage a sufficient compliance with §3982 Burns 1914, §2947 R. S. 1881? These questions are presented both by the appellant's demurrer to the second paragraph of complaint and the court's ruling thereon, and by the court's conclusion of law on the special findings.

It appears by the special findings of fact, which contain the substantial averments of the second paragraph of complaint, that on November 12, 1914, one Jacobs was indebted to the appellee in the sum of \$146.97, and to secure payment of said sum he executed to appellee a chattel mortgage by the terms of which he conveyed the automobile involved to the appellee. The chattel mortgage is in the usual form of such instruments, and is signed by said Jacobs and by said appellee. After these signatures appears the following:

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“Sworn and subscribed to this 12th day of November 1914.

“(Seal) Jno. H. Immel, Notary Public.

“My Commission expires November 13, 1917.”

November 22, 1914, was the first day of the week, commonly called Sunday. On November 23, 1914, at eight o'clock a. m., the appellee filed his chattel mortgage with the recorder of Allen county for record, and the same was accepted and recorded in volume 34, page 208, of the chattel mortgage records of Allen county, Indiana. If said chattel mortgage was sufficiently acknowledged, and if it was recorded in time under the statute, the judgment of the lower court should be affirmed; but if said chattel mortgage was not sufficiently acknowledged, or if it was not recorded in time under the statute, then the judgment of the lower court should be reversed.

In miscellaneous provisions of the Code, §1350 Burns 1914, §1280 R. S. 1881, provides that: “The

time in which an act is to be done, as herein  
1. provided, shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded.” The case of *Towell v. Hollweg* (1881), 81 Ind. 154, was a case involving the question whether a chattel mortgage had been recorded in time. In that case the court, after quoting the above section, and in speaking of the statute requiring chattel mortgages to be recorded in ten days after their execution, concludes that, in the computation of ten days' time in which a chattel mortgage should be recorded, “as this rule has been established in all cases provided for in the Code, it should be made uniform in all cases, except where otherwise expressly provided for \* \* \*.” This case is cited

and quoted with approval in the case of *Matthews, etc., Live Stock Ins. Co. v. Moore* (1915), 58 Ind. App. 240, 244, 108 N. E. 155, which case adopts the statutory method in computing time of notice of assessments by mutual insurance companies. In the case of *Benson v. Adams* (1879), 69 Ind. 353, 35 Am. Rep. 220, which involved the question of computing the time when a bill of exchange is due, the court, after quoting said section which was then §787 R. S. 1876, said: "This, we believe, is the uniform rule of computing time on a bill of exchange." In the case of *Vogel v. State, ex rel.* (1886), 107 Ind. 374, 378, 8 N. E. 164, 166, referring to said section, the court said: "The above section of the statute evidently has reference to matters properly falling within the code of civil procedure and not to matters in no way connected therewith, although some of the cases seem to give it a broader application. See *Towell v. Hollweg*, 81 Ind. 154." It is apparent that this statement is a correct construction of the section involved, which at that time was §849 of "An Act concerning proceedings in civil cases," Acts 1881 p. 240. In the case of *Williams v. State* (1854), 5 Ind. 235, an execution was dated March 3, 1843, and was returned March 4, 1844, the preceding day being Sunday. It was held that the year expired on March 3, 1844, but that being Sunday the execution was returnable by the statute on the following Monday. In the case of *State, ex rel. v. Thorn* (1867), 28 Ind. 306, §787, *supra*, was held to apply to the filing of a bill of exceptions. In *Catterlin v. City of Frankfort* (1882), 87 Ind. 45, said section was referred to, and was held to apply to the notice given by the common council of said city of its intention to petition the board of commissioners for the

annexation of certain territory adjacent to said city. This case quotes with approval *Towell v. Hollweg, supra*. In the case of *Backer v. Pyne* (1892), 130 Ind. 288, 30 N. E. 21, 30 Am. St. 231, certain real estate involved was sold on June 9, 1888, and the money was paid to the clerk and the right of redemption was asserted on June 10, 1889. It was held that June 9 fell on Sunday, and the redemption was well made on the Monday following, provided the redemption on Sunday would have been effective. The court said that where the last day for redemption is Sunday it may be made on the next day, citing said section as authority. This case said: "Our decisions have applied the rule to all cases affecting matters of statutory procedure." The case of *Flynn v. Taylor* (1896), 145 Ind. 533, 41 N. E. 546, refers to said section, and applies it in the computation of time in which a remonstrance may be filed in the application for a liquor license. The case of *Lee v. Shull* (1909), 172 Ind. 309, 88 N. E. 521, makes the same application of said section as the case of *Flynn v. Taylor, supra*. The case of *Arderly v. Dunn* (1914), 181 Ind. 225, 104 N. E. 299, applies said section as the rule in computing the time within which the superintendent and engineer in charge of highway construction on completion of the same should each file his sworn statement with the auditor of the county. It seems to us that in harmony with the case of *Vogel v. State, ex rel., supra*, we must hold that said section can only be applied to proceedings in civil cases, as the title of this act clearly states.

But though some of the foregoing decisions are based on the statute, while others, though referring to it, seem to reach their conclusions independently

thereof, they are in harmony in approving as a method of computation of time the statutory methods exemplified by said section, and in harmony therewith, have decided, when the question was involved, that the time in which an act is to be done shall be computed by excluding the first day and including the last, but if the last day is Sunday it shall be excluded. This line of decisions has been maintained for so long a time as to establish the aforesaid method of computation as the rule of law of this state, regardless of the statute. We hold that, independently of the statute, under the law of this state, the chattel mortgage, had it been entitled to record, was recorded in time.

But the certificate of acknowledgment is not

2. sufficient to justify the record of the instrument. In addition to its bad form and its failure to state the names of the parties acknowledging, and whether they acknowledged before the officer, for which we criticize it, it fails to give the state and county in which it was acknowledged, and the state and county in which the notary had his appointment. The case of *Cooper v. Smith* (1889), 75 Mich. 247, 252, 42 N. W. 815, is directly in point. See, also, *Guyer v. Union Trust Co.* (1914), 55 Ind. App. 472, 104 N. E. 82. The instrument with such a defective acknowledgment was not entitled to record, and hence is without force except as between the parties.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the second paragraph of the complaint, and for further proceedings in harmony with this opinion.

## MILLET V. AETNA TRUST AND SAVINGS COMPANY.

[No. 9, 668. Filed March 4, 1919. Rehearing denied June 5, 1919.]

1. **TRIAL.—Directing Verdict.—Failure to Object.**—The objection that the court erred in directing a verdict for plaintiff before defendant had introduced all of his evidence and rested his case was waived, where defendant, although excepting to the action of the court in giving the instruction, did not inform the court that he had not concluded his evidence, or sought to have the instruction withheld in order that he might complete his evidence, and took no other action to avoid the alleged error. p. 453.
2. **TRIAL.—Failure to Assert Rights.—Waiver.**—Where a party is in court in person or by counsel, and he fails to assert his legal right when an opportunity is afforded at the proper time to do so, such right is waived. p. 454.
3. **TRIAL.—Directing Verdict.—Evidence.**—Where there is uncontradicted evidence which clearly makes out a case for plaintiff, and no evidence which tends to establish a defense, it is proper for the court to instruct the jury to return a verdict in his favor. p. 454.
4. **TRIAL.—Directing Verdict.—Evidence.**—If defendant introduces evidence which, either directly or by fair inference, tends to sustain any defense within the issues, it is error for the trial court to direct a verdict for plaintiff. p. 455.
5. **BILLS AND NOTES.—Extension of Time of Payment.—Effect on Previous Defenses.**—Where the maker of a promissory note agrees with the payee that, if the latter will extend the time of payment for a definite time, he will pay at the expiration of such period, and the time is so extended, such promise constitutes a new contract, binding in law and capable of enforcement, though the maker may have had a good defense to the note before the agreement to extend was made. p. 457.
6. **CONTRACTS.—Ratification.—Void as Against Public Policy.**—A contract void as against public policy is not susceptible of ratification. p. 458.
7. **CONTRACTS.—Contract Void as Against Public Policy.—Waiver of Defense.—Estoppel.—Waiver of Illegality.**—A contract, void as against public policy, as between the parties, cannot be rendered valid by invoking the doctrine of estoppel, nor can a party thereto waive his right to set up the defense of illegality in an action thereon by the other party. p. 458.
8. **CONTRACTS.—Voidable Contract.—Ratification.—Execution of Renewal Notes.**—Where a contract on which a note is based is only

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voidable, it may be ratified by an execution of a renewal note by the maker with full knowledge of the facts. p. 458.

9. **BILLS AND NOTES.—Defenses.—Action Not Prosecuted by Real Party in Interest.—Pleading.**—In an action on a note, the defense that the suit is not prosecuted by the real party in interest, to be available, must be pleaded and proved. p. 458.

From Marion Superior Court (97,689); *W. W. Thornton*, Judge.

Action by the Aetna Trust and Savings Company against Grover Millett and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

*Newberger, Simon & Davis*, for appellant.  
*Holtzman & Coleman*, for appellee.

**BATMAN, P. J.**—This is an action on a promissory note brought by appellee against appellant, Grover A. Millett, and the Mercantile Adjustment Bureau. The complaint alleges that the note was executed by said appellant to the said Mercantile Adjustment Bureau, and afterwards transferred by it to appellee for value received, prior to the maturity thereof. The Mercantile Adjustment Bureau did not appear to the action. Appellant Grover A. Millett appeared and filed an answer in two paragraphs, the first of which is a general denial. The second paragraph alleges that the note in suit was given in part payment of certain corporation stock in the said Mercantile Adjustment Bureau; that appellant was induced to purchase said stock through the fraudulent representations of one Charles W. Martin, who was organizing and promoting said corporation; that such fact constituted a valid defense to said note, and that appellee had full knowledge of such fact prior to its alleged purchase thereof. The cause was submitted to a jury



for trial on the issues thus formed. After appellee had introduced its evidence and rested, and appellant, Millett, had introduced certain evidence, the court instructed the jury to return a verdict in favor of appellee against appellants for \$450. The jury returned a verdict in accordance with the court's instruction, on which judgment was rendered. Appellant, Millett, filed a motion for a new trial, which was overruled. He now prosecutes this appeal, and has assigned the action of the court in overruling his said motion as the sole error on which he relies for reversal.

Appellant predicates error on the action of the court in instructing the jury before he had introduced all his evidence and rested his case. The rec-

1. ord shows that after appellant had introduced certain documentary evidence, and had examined a number of witnesses in his defense, he called one Zeigler as a witness, and, after asking him a few preliminary questions, he was asked a question to which an objection was sustained. Whereupon the court, on its own motion, gave the jury a peremptory instruction to return a verdict in favor of the plaintiff against both defendants for the sum of \$450. The jury returned a verdict as directed, and on which the judgment from which this appeal is taken was subsequently rendered. The record shows that appellant at the time excepted to the action of the court in giving said instruction, but does not disclose that he informed the court that he had not concluded his evidence, or that he had other witnesses that he desired to examine, or that he made any objection to the court's instructing the jury at such time, or sought to have the instruction withheld or withdrawn in order

that he might conclude his evidence, or that he took any other step to avoid the alleged error. Appellant does not claim that he made any request in the trial court to introduce additional evidence, and there is no ruling of the court denying such request, assigned as a reason for a new trial. It is a well-settled

2. rule that where a party is in court in person or by counsel, and an opportunity is afforded him at the proper time to assert his legal right, a failure to do so is a waiver of such right. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85. Under the facts and rule stated, appellant's contention under consideration cannot be sustained.

Appellant not only contends that the giving of the peremptory instruction before he had rested his case was error, but also contends that the instruc-

3. tion itself, under the evidence, is erroneous, and the giving thereof was reversible error. It is well settled that where there is uncontradicted evidence which clearly makes out a case on behalf of a plaintiff, and no evidence which tends to establish a defense, it is entirely proper for the court to instruct the jury to return a verdict in his favor; and that in so doing the court does not usurp the province of the jury, but simply discharges a duty in the trial of the cause. *Insurance Co., etc. v. Indiana Reduction Co.* (1917), 65 Ind. App. 330, 117 N. E. 273, and authorities there cited. In the light of this rule, we have examined the evidence to ascertain if the court erred in directing a verdict in favor of appellee. The record shows that appellee introduced the note sued on in evidence, and obtained a stipulation that a reasonable attorney fee for collecting the same was \$37.50.

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It then rested its case, and, if appellant had introduced no evidence, the court would have been justified in directing a verdict in its favor. However,

4. evidence was introduced by appellant in an attempt to sustain his defense, and if such evidence, either directly or by fair inference, tends to sustain any defense on the part of appellant, within the issues, the giving of the instruction in question was error. Such evidence tends to establish the following facts: One Charles W. Martin was conducting a business in Indianapolis under the name of Mercantile Adjustment Bureau; that while conducting such business he became indebted to appellee for about \$1,800; that he informed appellee that he would not be able to pay his said indebtedness as it matured, and thereupon appellee suggested to him that he incorporate his business and sell stock therein, and thereby acquire funds with which he could discharge his indebtedness to it; that said Martin acted on said suggestion, and formed a corporation under the same name that he had theretofore conducted his business; that Martin solicited appellant to buy some of the stock therein, but he declined for the reason that he was not in a position to make a cash investment, as he stated to said Martin; that said Martin then told him that no money was required to make such purchase, but that he could give his note therefor, and the note would be paid out of the earnings of the corporation; that thereupon appellant bought five shares of said stock and gave his note therefor in the sum of \$500 payable to said corporation, but no certificate evidencing said stock was actually issued and delivered to him; that said note was by said Martin turned over to appellee, and applied on his individual indebtedness thereto; that

appellee prior to the maturity of said note in May, 1914, notified appellant that it held said note; that appellant then called on said Martin, who informed him that he need not worry about the note, that it would be taken care of; that the corporation paid to appellee \$125 on said note from its earnings as a dividend on the stock purchased by appellant; that thereupon appellant, at the request of said Martin, executed a new note to said corporation for \$375, maturing in October, 1914, in renewal of the balance due appellee on said \$500 note, and said new note was delivered to it for such purpose; that on the maturity of said last-named note appellee notified appellant of that fact, and subsequently sent him another notice that it was past due; that appellant then called on appellee and informed it that the note was given for stock in the Mercantile Adjustment Bureau, and was to be paid out of its earnings, and that he did not propose to pay a cent of it; that he afterwards told said Martin that there was to be no cash consideration at all, and he did not propose to pay the note; that afterwards appellee agreed to take a renewal of the note, and the note in suit was executed by appellant in October, 1914, due ninety days after date, for that purpose; that said note was made payable to the Mercantile Adjustment Bureau, and was delivered to appellee after being indorsed "Mercantile Adjustment Bureau per C. W. Martin Manager." The record shows that the facts stated above, with reference to the execution of said original note and the subsequent renewals thereof, are established by uncontradicted evidence, and it further appears, by like evidence, that appellant knew all the facts which he has sought to establish as a defense to the note in suit, at the time he executed the same.

It is well settled in this state that where the maker of a promissory note agrees with the payee that, if the latter will extend the time of payment for

5. a definite time, he will pay the same at the expiration of said period, and the time is so extended, such promise of the maker constitutes a new contract, binding in law and capable of enforcement, though the maker may have had a good defense to such note before the agreement to extend was made. *McCormick, etc., Co. v. Yoeman* (1901), 26 Ind. App. 415, 59 N. E. 1069; *Jaqua v. Montgomery* (1870), 33 Ind. 36, 5 Am. Rep. 168; *Doherty v. Bell* (1876), 55 Ind. 205; *Long v. Johnson* (1896), 15 Ind. App. 498, 44 N. E. 552; *Brown v. First Nat. Bank, etc.* (1888), 115 Ind. 572, 18 N. E. 56; *Baut v. Donly* (1903), 160 Ind. 670, 67 N. E. 503; *Merchants Nat. Bank v. Nees* (1916), 62 Ind. App. 290, 110 N. E. 73, 112 N. E. 904. Other states have recognized and given effect to this rule. *Franklin Phosphate Co. v. International Harvester Co.* (1911), 62 Fla. 185, 57 South. 206, Ann. Cas. 1913C 1247; *Stewart v. Simon* (1914), 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1916A 825. An application of this rule to the facts of this case makes it clear that no defense to the note in suit can be predicated on the original agreement with reference to the purchase of the corporate stock. Appellant has cited certain cases in support of his contention to the contrary, among which we note the following from this state: *Henry v. Gilliland* (1885), 103 Ind. 177, 2 N. E. 360; *Tyler v. Anderson* (1886), 106 Ind. 185, 6 N. E. 600; *Kain v. Bare* (1891), 4 Ind. App. 440, 31 N. E. 205. However, each of these cases is clearly distinguishable from the instant case. In the first case named it does not appear that the agreed extension was for a definite time. In the second case named the ground of

defense to the original note was unknown to the maker at the time he executed the renewal note. In the last case named the contract on which the original note was based was void as against public policy.

6. It was therefore not susceptible of ratification. 13 C. J. 506; *Austin v. Davis* (1891), 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St.

7. 456. Such a contract, as between the parties to it, cannot be rendered valid by invoking the doctrine of estoppel; nor can a party thereto

8. waive his right to set up the defense of illegality in an action thereon by the other party. 13

C. J. 506. In the instant case the contract on which the original note was based was not void, but according to appellant's theory was only voidable. It was therefore subject to ratification and was in fact ratified as evidenced by the renewal notes, executed by appellant with knowledge of all the facts which he now seeks to interpose as a defense in this action. It follows that, if it could be said that the representations made to appellant by said Martin at the time the stock in question was sold to him were fraudulent, such fact would not constitute a defense to the note in suit, under the circumstances in this case.

Appellant contends that the evidence in this case tends to show that the note in suit was the property of the Mercantile Adjustment Bureau, and that

9. Charles W. Martin used the same in an attempt to discharge his individual debt to appellee; that, if such is the fact, appellee acquired no interest in the note under the rule that an agent cannot use the property of his principal to pay his own debt; that such fact was for the determination of the jury, and hence the court erred in directing a verdict in favor of appellee. If the fact suggested were established,

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its effect would be to show that this action is not prosecuted by the real party in interest. It has been held repeatedly that this is an affirmative defense, which, to be available, must be pleaded and proved. *Stouffer v. Stoy* (1910), 46 Ind. App. 180, 91 N. E. 250; *Harrison v. State Bank, etc.* (1911), 47 Ind. App. 568, 94 N. E. 1020; *State Exchange Bank v. Paul* (1915), 58 Ind. App. 487, 108 N. E. 532; *Bowser v. Mattler* (1894), 137 Ind. 649, 35 N. E. 701, 36 N. E. 714. No such issue is tendered by the pleadings in this case, and hence appellant's contention in that regard is not well taken.

Appellant also predicates error on the action of the court in refusing to permit him to prove by the witness Shearer that the capital stock of the Mercantile Adjustment Bureau was worthless. As we have heretofore held that the execution of the renewal notes, under the undisputed facts of this case, precludes any defense based on the original agreement with reference to the purchase of said stock by appellant, there was no error in excluding said evidence.

As the uncontradicted evidence clearly makes out a case in favor of appellee, and there is no evidence which tends to establish a defense on behalf of appellant, the court did not err in giving the peremptory instruction. No available error appearing in the record, the judgment is affirmed.

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SHEEHAN CONSTRUCTION COMPANY v. KUHN.

[No. 9,789. Filed June 6, 1919.]

1. **APPEAL.—Review.—Harmless Error.—Sustaining Demurrer.**—  
In an action to quiet title, error cannot be predicated on the action of the trial court in sustaining a demurrer to a paragraph of answer where a general denial has been filed, since by §1101

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Burns 1914, §1055 R. S. 1881, all defenses, legal or equitable, in actions to quiet title, may be made under the general denial, so that the trial court's ruling was harmless. p. 461.

2. *APPEAL.—Presenting Questions for Review.—Conclusions of Law.—Necessity of Exceptions.*—It was not error for the trial court to overrule a motion to modify the conclusions of law, since there is no rule of practice authorizing such a motion, the appropriate remedy being by exceptions to the conclusions. p. 461.
3. *APPEAL.—Review.—Ruling on Motion to Modify Judgment.—Findings.—Failure to Challenge.*—In an action to quiet title, defendant's motion to modify the judgment by decreeing it entitled to an improvement lien on the land in controversy was properly overruled, where there was no motion for a new trial, so that the findings of the trial court must be taken as full, true and complete, and no finding was made which would have warranted the court in rendering the decree sought by defendant. p. 462.

From Marion Superior Court (94,929); *W. W. Thornton*, Judge.

Action by August M. Kuhn against the Sheehan Construction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Walker & Hollett* and *Ralph E. Jones*, for appellant.

*David F. Smith, Samuel D. Miller, Frank C. Dailey* and *William H. Thompson*, for appellee.

ENLOE, J.—Action to quiet title to certain real estate, brought by appellee against appellant. The complaint was in twelve paragraphs, to which appellant answered in two paragraphs: (1) General denial; and (2) setting forth facts claimed to be sufficient to show title in itself. Appellant also filed cross-complaint, wherein it asked to have its title quieted as against appellee.

Appellee demurred to appellant's second paragraph of answer, and also filed answer in general denial to appellant's cross-complaint. The demurrer of appellee to said paragraph of answer was sustained.



The cause was submitted to the court, which upon due request found the facts specially, and stated its conclusions of law thereon, favorable to the appellee, and judgment was rendered accordingly.

The errors assigned are: (1) Error in sustaining demurrer to appellant's second paragraph of answer; (2) error in overruling appellant's motion to modify and restate conclusions of law numbered 1, 3 and 4; (3) error in overruling appellant's motion to modify judgment; (4) error in conclusion of law No. 3; (5) error in conclusion of law No. 4.

Since by our statute (§1101 Burns 1914, §1055 R. S. 1881) all defenses, legal or equitable, in actions of this character, may be made under the answer

1. of general denial, error cannot be predicated on the action of the court in sustaining the demurrer to the second paragraph of appellant's answer, since such action of the court was harmless. *Gibbs v. Potter* (1906), 166 Ind. 471, 77 N. E. 942, 9 Ann. Cas. 481.

The second assigned error challenges the action of the court in overruling appellant's motion to modify and restate the court's first, third and fourth conclusions of law.

In case of *Radabaugh v. Silvers* (1893), 135 Ind. 605, 35 N. E. 694, the court said: "There was no error in overruling the motion to modify the conclusions of law. We know of no rule of practice authorizing such a motion. \* \* \*

The appropriate remedy is by excepting to the conclusions of law, and not by a motion to modify. Otherwise the statute could be practically nullified, which requires the exception to such conclusions to be taken at the time."

Appellant next complains of the action of the court

in overruling its motion to modify the judgment theretofore rendered herein, by adjudging and de-

3. creeing that the appellant, Sheehan Construction Company, had and held a lien upon the lands in question, to the extent and value of certain alleged improvement liens, acquired by it as holder of the assessment roll adopted and approved by the board of public works of the city of Indianapolis on June 24, 1905.

There was no error in this ruling. Our statute (§308f Burns 1914, Acts 1909 p. 334, §6) provides: "The lien for all assessments for streets, sewers, sidewalks, ditches, and other public improvements shall cease and expire five years from the time the same and the several installments thereof are due and payable, as shown by the record creating and evidencing such lien."

There was no motion for a new trial, and therefore, for the purposes of this case, the findings of the trial court must be taken as full, true, and complete, and there is no finding which would have warranted the court, under the provisions of the above statute, in rendering such a decree as the one requested by appellant.

The record in this case discloses that the appellant did not except to the court's fourth conclusion of law—that the appellee, August M. Kuhn, was entitled to a decree of the court quieting his title as against all the defendants to his complaint, including Sheehan Construction Company, to certain lots therein set forth and described.

None of the assigned errors are well taken, and the decree of the Marion Superior Court is therefore affirmed.

Decree affirmed.

## WASHBURN-CROSBY COMPANY v. COOK.

[No. 9,621. Filed October 15, 1918. Rehearing denied December 19, 1918. Transfer denied June 6, 1919.]

1. TRIAL.—*Verdict.—Answers to Interrogatories.*—The answers to special interrogatories must be in irreconcilable conflict with the general verdict to authorize a judgment thereon. p. 467.
2. TRIAL.—*Verdict.—Effect.*—A general verdict for plaintiff finds in his favor every issuable fact essential to his recovery. p. 467.
3. APPEAL.—*Review.—Verdict.—Answers to Interrogatories.—Scope of Review.*—In passing upon a motion for judgment on the jury's answers to interrogatories, notwithstanding the general verdict, the court on appeal can consider only the general verdict, the answers to the interrogatories and the issues presented by the pleadings. p. 467.
4. TRIAL.—*Verdict.—Answers to Interrogatories.*—To sustain the general verdict as against the jury's answers to special interrogatories, courts consider all the material facts provable under the issues. p. 467.
5. MASTER AND SERVANT.—*Independent Contractor.—Answers to Interrogatories.—Effect.*—In an action for injuries sustained by one who, while traveling upon a public street, was kicked by a horse used in defendant's business, but owned by a third person, the jury's answers to certain interrogatories *held* not to show conclusively that the owner was an independent contractor, when the answers to such interrogatories were considered in connection with further answers. p. 467.
6. NEGLIGENCE.—*Injuries to Pedestrians.—Verdict.—Answers to Interrogatories.*—In an action for injuries sustained by a pedestrian when kicked by a horse used by defendant in his business, but owned by a third person, answers to interrogatories *held* not in irreconcilable conflict with general verdict for plaintiff. p. 468.
7. NEGLIGENCE.—*Independent Contractor.—Liability.*—Where one lets a contract to another to do a particular work, and retains no control over the details, means or plans by which the contract is to be executed, but looks only to the ultimate results to be obtained according to the standard agreed upon, he is not responsible for the negligence of the contractor or those who perform the work provided for in the contract. p. 468.
8. MASTER AND SERVANT.—*Independent Contractor.—Personal Injuries.—Liability.—Evidence.*—In an action for personal injuries, where plaintiff alleged that he was kicked by a horse used in de-

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fendant's business, and, though known by defendant to be vicious and dangerous, the horse was negligently left in a street to be fed, with no one to control or manage him, evidence showing defendant's participation in the keeping, use and control of the horse, though owned by another, and that defendant knew of the vicious nature of the animal and of the custom of feeding it in the street where plaintiff was injured, was sufficient to sustain a general verdict for plaintiff, it not being essential to a recovery to show that defendant had exclusive control of the horse. p. 469.

9. **APPEAL.—Briefs.—Waiver of Error.**—Where defendant, although assigning excessive damages as a ground for new trial, fails to state any proposition or point on that subject under the points and authorities in its brief, the question is waived. p. 470.

From Marion Circuit Court (25,048); *Louis B. Ewbank*, Judge.

Action by Ray H. Cook, by his next friend, Anna B. Cook, against the Washburn-Crosby Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Elias D. Salsbury, Charles J. Schuh, Charles W. Miller and Frank S. Roby*, for appellant.

*Guy R. Estabrook*, for appellee.

**FELT, P. J.**—This is an action by Ray H. Cook, a minor, by his next friend, Anna B. Cook, against appellant, to recover damages for personal injuries.

The complaint in one paragraph was answered by a general denial. A trial by jury resulted in a verdict for appellee in the sum of \$2,400. Judgment was rendered on the verdict, from which appellant appealed, and has assigned as error that the court erred in overruling its motion for judgment on the answers of the jury to the interrogatories, and in overruling its motion for a new trial.

The complaint charges in substance that appellant

is a foreign corporation doing business in the city of Indianapolis; that as a part of its business in said city it kept and used certain horses in delivering flour, meal and bran to its customers, and at and prior to the time of appellee's injury was such keeper of a certain horse, which was vicious and dangerous and would kick and injure persons, all of which was well known to the defendant; that on November 2, 1914, in said city, the defendant did then and there carelessly, negligently and unlawfully cause, allow and permit said vicious and dangerous animal to run at large on certain streets of said city, in violation of the laws and ordinances of said city, and negligently fed said horse in a trough in and upon the crossing of Davidson and Cross streets in said city, and negligently failed to have any one in charge of him to control and manage him; that appellee was on said day lawfully on said street, and was kicked by said vicious horse and permanently and severely injured.

The answers to interrogatories show in substance that appellant and one J. C. Smith on April 23, 1914, entered into a contract which provides in substance that said Smith shall furnish appellant two teams, drivers, and all equipment exclusive of wagons, which were to be furnished by appellant, to handle and deliver flour for appellant at a stipulated weekly compensation. Smith was to be responsible for all flour handled by his teamsters, and to collect for the same, and remit daily in full all money so collected and make a daily report of all deliveries. He was to provide "first-class teams heavy enough to at all times handle the business" of appellant, and drivers acceptable to Washburn-Crosby Company. The contract further provides that:

“The party of the second part shall act as agent for the party of the first part in all such services as outlined and in all collections and receipt of money therefor and all payments thus received by the party of the second part for flour thus handled. \* \* \* This contract to be in force for one year from date, but can be set aside by either party on notice being given the other party in writing or in the event of nonfulfillment of the terms of the contract or unsatisfactory service.”

The answers further show that appellee was injured on November 2, 1914, by being kicked by one of the horses owned by J. C. Smith and used in hauling flour for appellant; that said Smith was not at the time of such injury working under the terms of the aforesaid contract; that two teams owned by Smith and so used were at the time eating from boxes, in which feed had been placed by appellant's warehouseman, north of appellant's warehouse; that the horse which kicked appellee was vicious, and appellant had knowledge of the fact that it was vicious and a kicker some time before appellee was injured, and received notice of that fact from said J. C. Smith, appellants' local agent; that J. C. Smith at the time of the injury owned the two teams in use by his teamsters and one of the wagons, and had control of the teams; that appellee when injured was “in Cross street.”

Appellant contends that the answers to the interrogatories are in irreconcilable conflict with the general verdict, and show conclusively that the horse which injured appellant was not owned, kept, or controlled by appellant, but was kept, used, owned and

exclusively controlled by J. C. Smith, an independent contractor.

The answers to the interrogatories must be in irreconcilable conflict with the general verdict to authorize judgment thereon. The general verdict finds in

1-4. appellee's favor every issuable fact essential to his recovery. In passing upon the question presented, we consider only the general verdict, the answers to the interrogatories and the issues presented by the pleadings. To sustain the general verdict, courts consider all the material facts provable under the issues.

The answers which show that Smith and appellant entered into a contract, and that Smith owned and controlled the teams at the time appellee was

5. kicked by one of the horses, do not conclusively settle the proposition that Smith was an independent contractor and that appellant had no control over him or his horses, and was interested only in the ultimate results to be obtained by the contract with Smith.

Other answers, and the facts provable under the issues, show that appellant had or assumed control or management of the horses in whole or in part; that Smith was subject to the orders of appellant in matters pertaining to the details of the work he was to do under the contract; that the parties had abandoned the contract and were not operating under it, and that appellant with knowledge of the vicious nature of the horse participated in feeding him in or nearby the public street, and thereby exposed appellee and others to the danger of being injured while rightfully upon such street.

The answers do show that appellants' warehouse-

man fed the horse on the day of appellee's injury, and that appellant had prior knowledge of the vicious and dangerous tendencies of the horse which injured appellee; also that Smith was the local agent of appellant in the transaction of the business in connection with which the teams were used, and that he was not operating under the contract when appellee was injured. The answers also show that appellee was actually upon a public street, where he had a right to be, when injured.

Some of the answers may tend to nullify others, but considering all the facts found by the answers to

interrogatories and those provable under the

6. issues, the answers to interrogatories are not in irreconcilable conflict with the general verdict, which finds that appellee knew of the vicious and dangerous propensities of the horse which kicked appellee, and also kept and controlled him at the time of the injury.

As presented here, we cannot hold the answers to interrogatories conclusively show that Smith was an independent contractor, or that appellant did not have and exercise control over the details of the execution of the contract relied upon, or that it did not have, or assume, control, in whole or in part, over the teams that were hauling for it, or that it was not responsible for placing or leaving the vicious horse in or near the street where appellee was injured.

The general proposition is well established that one who lets to another a contract for certain work to be done, and retains no control over the details,

7. means, or plans by which such contract is to be executed, and looks only to the ultimate results to be thereby obtained, according to the standard



agreed upon, is not responsible for the negligence of such contractor or of those who perform the work provided for in such contract. But such proposition is not available here to overthrow the general verdict for the reasons above indicated. *Falender v. Blackwell* (1906), 39 Ind. App. 121, 127, 79 N. E. 393; *Marion Shoe Co. v. Eppley* (1914), 181 Ind. 219, 222, 104 N. E. 65, Ann. Cas. 1916D 220; *Prest-O-Lite v. Skeel* (1914), 182 Ind. 593, 597, 106 N. E. 365, Ann. Cas. 1917A 474; *Indiana Iron Co. v. Cray* (1898), 19 Ind. App. 565, 577, 48 N. E. 803; *Lawlor v. French* (1895), 14 Misc. Rep. 497, 35 N. Y. Supp. 1077; *Lettis v. Horning* (1893), 67 Hun 627, 22 N. Y. Supp. 565; *Grant v. Ricker* (1883), 74 Maine 487; *Burns v. Michigan Paint Co.* (1908), 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; *Foster v. Wadsworth-Holland Co.* (1897), 168 Ill. 514, 48 N. E. 163.

Under the motion for a new trial, appellant presents the question of the sufficiency of the evidence to sustain the verdict.

It is contended that there is a total absence of evidence tending to sustain the allegation that appellant kept, or in any way controlled, the horse that injured appellee.

Notwithstanding the provisions of the contract relied upon by appellant, there is evidence tending to sustain the allegations that appellant kept and controlled such horse.

It is not essential to a recovery that the evidence show that appellant alone kept the horse at the time in controversy, or that he had exclusive control of him. There is evidence tending to show

appellant's participation in the keeping, use and control of the horse and prior knowledge of his

vicious nature and kicking propensities; also knowledge of the fact, or participation in the act, of placing him at the noon hour in or near the public street upon which appellee was injured.

On appeal such showing is sufficient to sustain the verdict under the allegations of the complaint. *Gordon v. Kaufman* (1909), 44 Ind. App. 603, 606, 89 N. E. 898; *Indianapolis Abattoir Co. v. Bailey* (1913), 54 Ind. App. 370, 375, 102 N. E. 970; *Lettis v. Horning, supra*; *Grant v. Ricker, supra*; *Klenberg v. Russell* (1890), 125 Ind. 531, 533, 25 N. E. 596; *Graham v. Payne* (1890), 122 Ind. 403, 405, 408, 24 N. E. 216.

It is also contended that the court erred in giving to the jury instruction No. 26 on the measure of damages.

Appellee, as a minor, brought suit by his next friend. The instruction complained of authorized the jury, in case they found for the plaintiff, in assessing his damages to consider "any impairment of

9. his ability to work and earn money, if any is shown." It is urged that the instruction thus authorized the jury to assess damages for loss of appellee's ability to earn money during the period of his minority from the age of twelve years until he becomes twenty-one years of age; that the evidence also shows that his parents are living.

Appellee contends that no reversible error is shown, though there be an error in the wording of the instruction, and in support of this contention relies on the decisions which hold that the instructions should be considered in their entirety and that an error affecting the question of damages is not available unless the amount of the verdict has been duly challenged in the motion for a new trial and in appellant's briefs.

The motion in this case does assign as one of the causes for a new trial that the damages assessed by the jury are excessive, but no point is made or presented in the briefs in relation thereto.

Appellant in its briefs, under "Points and Authorities," states that the court erred in overruling its motion for a new trial, on the thirty-second assignment of such motion relating to instruction No. 26 given the jury on the court's own motion.

The allegation of the complaint that appellee is a minor is pointed out and it is stated that any reduction of appellee's power to earn money during his minority did not entitle him to recover damages therefor, and for the reason that his wages during such period belong to his parents, unless he has been emancipated, which is not shown in this case.

By the decisions of both courts of last resort in this state it has been held that failure to assign as cause for a new trial that the damages assessed are excessive waives any question on appeal relating to the amount of damages, and likewise that failure to duly and definitely present the question of excessive damages in the briefs of the complaining party, though assigned as a cause for a new trial, amounts to a waiver of such question.

It follows that, by failing to state any point or proposition under the motion for a new trial on the subject of excessive damages, appellant has waived any question relating thereto that might have been presented under such motion. *Carter v. Caldwell* (1915), 183 Ind. 434, 437, 109 N. E. 355; *Sovereign Camp, etc. v. Latham* (1915). 59 Ind. App. 290, 307, 107 N. E. 749; *City of Terre Haute v. Lauda* (1915), 58 Ind. App. 480, 485, 108 N. E. 392; *Chicago, etc., R.*

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*Co. v. Brown* (1917), 66 Ind. App. 126, 115 N. E. 368, 372; *Pittsburgh, etc., R. Co. v. Macy* (1915), 59 Ind. App. 125, 140, 107 N. E. 486; *Peabody-Alwert Coal Co. v. Yandell* (1913), 179 Ind. 222, 229, 100 N. E. 758.

Furthermore, upon the whole record, the case seems to have been fairly tried on its merits. No intervening error has been pointed out which deprived appellant of any substantial right, or which probably influenced the jury in arriving at its verdict.

Considering the undisputed evidence, the serious injury, the permanent harmful results, and the amount of the verdict, it is not at all probable that the result of a new trial would be substantially different or more favorable to appellant than the one out of which this appeal arose. §§407, 700 Burns 1914, §§398, 658 R. S. 1881; *Inland Steel Co. v. Ilko* (1914), 181 Ind. 72, 80, 103 N. E. 7; *First Nat. Bank v. Ransford* (1914), 55 Ind. App. 663, 668, 104 N. E. 604.

Judgment affirmed.

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#### RESERVE LOAN LIFE INSURANCE COMPANY v. SUMNER.

[No. 9,905. Filed June 6, 1919.]

1. **PLEADING.**—*Motion to Strike Out.*—*Office of.*—If a pleading is a proper one to be filed and is timely filed, a motion to strike out should not be sustained, and, if such pleading is insufficient, it should be demurred to, so that the pleader may have an opportunity to correct the fault thereof. p. 477.
2. **INSURANCE.**—*Life Insurance.*—*Surrender of Policy.*—*Consent of Beneficiary.*—Under a life policy providing that insured would be paid the cash surrender value of the policy, under certain conditions, on a full and valid surrender of the policy being made by insured, the beneficiary named in the policy is a necessary party to such surrender. p. 479.

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3. **INSURANCE.—Life Insurance.—Action for Cash Surrender Value.—Breach of Policy Conditions.—Failure to Surrender Policy.—Statutes.**—In view of §4622a, cl. 10, Burns 1914, Acts 1909 p. 251, providing for extended insurance upon default in premium payment after three years, or payment of cash surrender value upon surrender of the policy by insured at the company's home office, and a clause in the policy stipulating for payment of cash value upon default and "a full and valid surrender" of the policy, a letter by insured to the insurer notifying it that he elected to pay no further premiums, and desired payment of the cash surrender value due on the policy, without actually surrendering the policy, was insufficient. p. 480.
4. **APPEAL.—Briefs.—Waiver of Error.**—Where appellant failed to mention, under the points and authorities in its brief, any of the instructions tendered by it and refused, error, if any, in such refusal is waived. p. 480.
5. **INSURANCE.—Life Insurance.—Action for Cash Surrender Value of Policy.—Instructions.**—In an action against an insurance company for the cash surrender value of a life insurance policy which required a "surrender of the policy and all claims hereunder" as a condition precedent to insured's obtaining such cash surrender value, an instruction that before insured was entitled to the surrender value of the policy, he must have made such a complete and definite surrender of the policy as that he had no further interest or claims against the defendant by reason of the policy, was erroneous, since it did not measure the rights of insured by the terms of the contract. p. 481.
6. **INSURANCE.—Life Insurance.—Action for Cash Surrender Value of Policy.—Instructions.**—In an action by insured against an insurance company to recover the cash surrender value of a life insurance policy which required a full and valid surrender of the policy and all claims thereunder as a condition precedent to insured's obtaining such cash surrender value, an instruction that, if insured offered to surrender the policy and such offer was subject to a suggestion of defendant as to what to do with the policy, and insured was not so advised, the insurer would be liable, was erroneous as not limiting the rights of insured to those acquired under the policy. p. 481.
7. **INSURANCE.—Life Insurance.—Action for Cash Surrender Value of Policy.—Policy Conditions.—Compliance.—Written Request.**—Where a life insurance policy provided for the payment of the cash surrender value of the policy upon receipt of a written request from insured, an instruction that the deposit in the mail of a letter properly stamped and addressed and containing such re-

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quest, was sufficient, was erroneous as altering the rights given insured under the contract. p. 482.

8. EVIDENCE.—*Admissibility.—Contents of Letter.—Oral Testimony After Notice to Produce.*—It was not error for the trial court to permit plaintiff to testify as to the contents of a letter alleged to have been written by him to defendant, where the record shows that timely notice had been served on defendant to produce the same. p. 483.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Millard Filmore Sumner against the Reserve Loan Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Guilford A. Deitch, Frank G. West and D. D. Corn*, for appellant.

*Ely & Ely, J. L. Sumner and Frank Ely*, for appellee.

ENLOE, J.—This was an action by appellee against appellant to recover the alleged cash surrender value of a policy of life insurance, issued by appellant company, upon the life of the appellee, and payable in case of the death of the insured while said policy was in force, to Amanda Sumner, wife of the insured.

The complaint was in one paragraph, the material averments of which were in substance as follows: That, July 8, 1911, the appellee entered into a contract of insurance with the appellant, by the terms whereof the appellant promised to pay to Amanda Sumner, wife of appellee, the sum of \$5,000 in case of the death of appellee; that said contract and policy of insurance provided, among other things:

“That at any time after two annual premiums have been paid hereon, and within one month from date of default in payment of any premium,

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the company will, within ninety days after receipt of written request by the insured, with a full and valid surrender of this policy and all claims hereunder, pay a cash surrender value as indicated in the table of guaranteed value (plus the value of the reserve, of any dividend addition), opposite the number of years for which annual premiums have been paid."

That appellee agreed to pay appellant for said contract and policy of insurance the sum of \$266.45 a year for each and every year said policy was in force, unless appellee elected to avail himself of said cash surrender value at any premium paying time; that appellee paid appellant the annual premium due on said policy for the years 1911, 1912 and 1913; that on July 8, 1914, said contract of insurance and policy had a cash surrender value of \$255, as shown by the table of guaranteed values in said contract and policy of insurance; that within less than one month from and after July 8, 1914, appellee elected to cease paying further premiums on said policy, and elected to avail himself of the cash surrender value due to him, on and by virtue of the terms of said policy, on said date, to wit, said sum of \$255; "that within less than one month from said 8th day of July, 1914, the plaintiff, in writing, notified defendant that he had elected to pay no further premiums on said policy; that he wished and desired them to pay to him the cash surrender value then due on the policy, to wit, said \$255.00, and that he did not wish to carry said policy any longer; for said defendant to send to him said cash surrender value thereon, and to notify him, the plaintiff, what to do with said policy, and for defendant to consider said policy canceled"; that appel-

lant has refused to pay, etc., and that there has been an unreasonable delay, etc.

To this complaint appellant unsuccessfully demurred. It then filed its answer in five paragraphs: (1) General denial; (2) payment; (3) that the provision of the policy stipulating the manner in which the cash surrender value thereof might have been obtained had not been complied with, and that said policy had been continued in force as "extended" insurance, as required by statute (Acts 1909 p. 251); (4) the failure of appellee to comply with provision of policy relating to obtaining cash surrender value thereof and matter of estoppel; (5) averring that, although appellee did write a letter to appellant within thirty days after default in reference to the cash surrender value of said policy, he did not surrender said policy as required by law and by the terms of said policy, but abandoned said alleged election, and received from appellant full consideration for said policy in the form of extended insurance.

Upon motion of appellee, appellant's third, fourth and fifth paragraphs of answer were stricken from the files, and reply in general denial by appellee to the second paragraph of answer closed the issues. Upon the issues thus formed the cause was submitted to a jury for trial, which returned a verdict for appellee in the sum of \$279.86.

The errors assigned and relied upon for a reversal are: (1) Error in overruling demurrer to complaint; (2) error in sustaining motion to strike third paragraph of answer from the files; (3) error in sustaining motion to strike fourth and fifth paragraphs of answer from the files; (4) error in overruling motion for new trial.



While in the view we take of this case the second and third assigned errors are of no controlling influence, we will notice them.

It has been held that a motion to strike a pleading from the files cannot perform the office of a demurrer.

If a pleading is a proper pleading to be filed,

1. and is timely filed, a motion to strike out the same should not be sustained. If such pleading is insufficient, it should be demurred to, so that the pleader may have an opportunity to correct the fault thereof. *Burk, Exr., v. Taylor* (1885), 103 Ind. 399, 3 N. E. 129.

In *Mabin v. Webster* (1891), 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199, it is said: "The third paragraph of answer was an attempt to plead a rescission of the marriage contract. The question as to whether or not it is properly pleaded so as to withstand a demurrer is not before us. A motion to strike out admits the truth of all the facts well pleaded for the purpose of the motion, and the motion should not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer."

The second and third assignments are well taken.

Section 4622a, subd. 10, Burns 1914, Acts 1909 p. 251, provides: "That in the event of the default of premium payment, after premiums have been paid for not less than three years, the insured shall be entitled to the extended insurance shown in the table of values and options for the end of the last year for which full annual premiums have been paid: \* \* \* Provided, That the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal

to the sum which would otherwise be available for the purchase of extended insurance as aforesaid; and, Provided, further, that the company may defer payment for not more than six months after application therefor is made \* \* \*."

The above statute, enacted in 1909 (Acts 1909 p. 251), required of all Indiana life insurance companies that they insert the above condition in all policies thereafter issued, and accordingly we find in the policy in suit the following:

"That at any time after two annual premiums have been paid hereon, and within one month from the date of default in payment of any premium, the company will, within ninety days *after receipt of written request by the insured, with a full and valid surrender of this policy, and all claims hereunder*, pay a cash surrender value as indicated in the table of guaranteed values (plus the value of the reserve on any dividend additions) opposite the number of years for which annual premiums have been paid." (Our italics.)

Under the provisions of the above quoted statute, upon a default in payment of an annual premium by the insured, three annual payments having been made, two courses were open to the insured under the terms of his policy, viz., he could avail himself of the provisions for a "cash surrender," or he could have the extended insurance. The first came to him by his choosing it; the second came to him by force of the statute, in case he did not avail himself of his right to take the "cash surrender" value. To avail himself of the one required him, the insured, to act; while he would receive the benefit of the other without any act in that behalf on his part.

If the agreement as to the cash surrender value and canceling of said policy, as contained in said policy, was not in conflict with the statute above referred to, and appellee by basing this suit thereon affirms its validity, then such agreement is the measure of the rights of the parties to this controversy. It is their contract, and the courts have no right to change or modify it, or engraft other conditions or limitations thereon.

To avail himself of this privilege of obtaining the "cash surrender" value of the policy, the statute in question provides that "*the policy may be surrendered to the company at its home office within one month,*" and the contract upon which this suit was based provided, "After receipt of written request by the insured, *with a full and valid surrender of this policy,*" etc.

It will also be noted that the wife of the insured, Amanda Sumner, was the beneficiary named in this policy of insurance, and under the law of this

2. state, as declared in the case of *Indiana, etc., Life Ins. Co. v. McGinnis* (1913), 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, the appellee herein had no power to cancel said policy of insurance by contract with appellant, unless his wife, the named beneficiary, should voluntarily surrender said policy and her interest therein, and thereby permit the same to be canceled. In view of the law, as disclosed in the McGinn's case, *supra*, the force, effect and importance of the language of the policy, "with a full and valid surrender of this policy," becomes at once apparent. It was the *vital things* to be done by the insured, so far as the protection of the company writing the policy was concerned.

Do the averments of the complaint measure up to this standard, and show that appellee did the things required of him?

He alleges in his complaint that "the plaintiff in writing notified defendant that he had elected to pay no further premiums on said policy; that he  
3. wished and desired them to pay him the cash surrender value then due on the policy;  
\* \* \* that he did not wish to carry said policy any longer; for said defendant to send to him the cash surrender value due thereon, and to notify him, the plaintiff, what to do with said policy, and for said defendant to consider said policy cancelled." This was not sufficient. This was not a "full and valid surrender of this policy and all claims herein," as required by the contract. The complaint therefore was insufficient, and the demurrer thereto should have been sustained.

The appellant also complains of the action of the trial court in overruling its motion for a new trial.

The reasons assigned for a new trial in appellant's motion therefor are as follows: (1) That the verdict is not sustained by sufficient evidence; (2) that the verdict is contrary to law; (3) and (4) error in admitting certain evidence offered by appellee; (5) error in refusing to give certain instructions requested by appellant; and (6) error in giving certain instructions of the court's own motion.

Appellant, by its failure to mention under "points and authorities" in its brief any of the instructions tendered by it and refused, has waived the  
4. error of court, if any was committed in such refusal, and said instructions will not therefore be considered.

Appellant complains of the third, fourth and fifth instructions, as given by the court, and we will notice them in their order.

The third instruction is erroneous. The latter part of said instruction, which is an attempted explanation of the preceding part of said instruction, 5. is as follows: "In other words, before he is entitled to surrender value of the policy, he must, by words or actions make such a complete and definite surrender of the policy to defendant as that he has no further interest or claims against the defendant, by reason of the policy." This instruction, in effect, told the jury that the contract or policy was not the measure of the respective rights and duties of the parties. Under this instruction, the appellee could declare the policy canceled, and maintain thereafter an action for the cash surrender value thereof, notwithstanding the interest of his wife, the named beneficiary, had in no way been affected by such declaration of her husband, the appellee. The contract required a "*surrender of the policy and all claims herein*" (our italics), and this was the measure of appellee's duty in that behalf, if he would claim the cash for its surrender.

The fourth instruction given to the jury concluded as follows: "On the other hand, if he has shown by a preponderance of the evidence that within 6. the time stated he *offered to surrender* (our italics), and that offer to surrender was subject to a suggestion of the defendant what to do with the policy, and they did not advise him, then I instruct you, if all of the other essential and material allegations have been made out by a preponderance of the evidence, he would be entitled to recover at your hands."

This instruction is subject to the same criticism as No. 3 above. It did not limit the right of appellee to those acquired under the terms of his contract.

The fifth instruction given by the court is also erroneous. In it the jury were told, among other things:

“If you find by a preponderance of the evidence, that such a letter as contended for, containing such statements as contended for, was sent by the plaintiff to the defendant insurance company, and that said letter was properly addressed, sealed and stamped and placed in the United States mail, that would be all that would be required of this plaintiff to do in order to avail himself of that clause in the policy, which authorizes a surrender value thereof. He is not required to show that the company actually received it, but he must show that he properly mailed and addressed a letter containing such statements to the defendant. If you find from a preponderance of the evidence heretofore referred to, that the defendant company took no action, or made no answer thereto, then I instruct you in law that such statements in said letter, if true, were in law sufficient to constitute a surrender of the policy, and a request of the defendant company to pay to plaintiff the surrender value thereof.”

This instruction was directed to the testimony of appellee, who had testified in substance that, on August 5, 1914, he had written the appellant a letter stating that “I would forfeit my policy and take the cash value of it, and for them to notify me what to do with the policy. I enclosed it in an envelope addressed to the company and put a two-cent stamp on it, and put it in the mail box, and never saw it afterwards.”

The clause in the policy provided “upon receipt of

written request," etc., but this instruction would turn this condition into one reading, "upon the *mailing* to us of written request," etc. In other words, the condition in the policy required actual notice in writing to appellant, while the instruction would hold the appellant liable, if such notice were mailed to appellant, whether it in fact ever received such notice or not.

To hold the foregoing instruction correct would be in effect to hold that the courts have the power to alter and change the contract as made by the parties; to engraft thereon terms and conditions which the parties did not have in mind, and place therein. If courts could thus change the contract as made by the parties, then the making of contracts would be useless. Courts have no such authority. See *Fields v. United Brotherhood, etc.* (1895), 60 Ill. App. 258, and authorities there cited.

Appellants also insist that the court committed error in permitting the appellee to testify as to the contents of a certain letter alleged to have

8. been written by him, but under the showing made in this record we hold that the court did not err in permitting said witness to testify as to contents of said letter, notice having been timely served upon appellant to produce the same. Other assigned errors need not be noticed.

The judgment is reversed, with directions to the trial court to sustain appellant's motion for a new trial; also to sustain appellant's demurrer to the complaint, and for further proceedings not inconsistent herewith.

H. W. JOHNS-MANVILLE COMPANY v. SOUTH SHORE  
MANUFACTURING COMPANY ET AL.

[No. 9,907. Filed June 17, 1919.]

1. **NEW TRIAL.**—*Supplemental Motion.*—*Time for Filing.*—The filing of a supplemental motion for a new trial more than thirty days after the decision of the court on the merits of the cause is unauthorized, and it is not error for the court to strike it out. p. 486.
2. **APPEAL.**—*Questions Reviewable.*—*Judgment.*—*Inadequate Recovery.*—*Failure to Incorporate Evidence in the Record.*—As the determination of the question whether interest should have been included in the amount of recovery requires a consideration of the evidence, such question cannot be determined in the absence of the evidence from the record. p. 487.
3. **EVIDENCE.**—*Judicial Knowledge.*—*Expiration of Term of Court.*—The Appellate Court knows judicially that the October, 1916, term of the Lake Superior Court expired in November of that year. p. 487.
4. **APPEAL.**—*Record.*—*Bill of Exceptions.*—*Approval and Filing.*—Where the bill of exceptions containing the evidence was not filed during the term at which the motion for a new trial was overruled, nor within the time given beyond such term for that purpose, nor presented to the judge of the trial court for his approval within such time, the bill is not part of the record. p. 487.
5. **APPEAL.**—*Record.*—*Bill of Exceptions.*—*Sufficiency.*—*Failure to Include all the Evidence.*—*Scope of Review.*—Where a bill of exceptions purporting to contain all the evidence shows on its face that a contract not appearing in the bill was read in evidence, the court on appeal cannot determine a question requiring a consideration of the evidence. p. 488.
6. **MECHANICS' LIENS.**—*Foreclosure.*—*Interest on Claims.*—*Burden of Proof.*—In an action to foreclose a mechanic's lien, if plaintiff believed it was entitled to recover interest on its claims, the duty rested upon it to establish that fact by the evidence, and to furnish proper data from which the amount thereof could be computed. p. 489.
7. **APPEAL.**—*Record.*—*Bill of Exceptions.*—*Sufficiency.*—*Failure to Incorporate all the Evidence.*—*Questions Reviewable.*—Where the bill of exceptions fails to disclose the contract out of which it is alleged that plaintiff's claim arose, or any fact from which the trial court could determine whether anything was due plaintiff as



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interest, the court on appeal is unable to ascertain whether the contract provided for interest, and cannot determine the contention that the trial court erroneously failed to include interest in the amount of recovery. p. 489.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by the H. W. Johns-Manville Company against the South Shore Manufacturing Company and others. From the judgment rendered, the plaintiff appeals. *Affirmed*.

*Bomberger, Peters & Morthland* and *Vose & Page*, for appellant.

*Greenlee & Call* and *F. B. Pattee*, for appellees.

BATMAN, C. J.—This is an action by appellant against appellees to foreclose a mechanic's lien against land of the South Shore Manufacturing Company, and to require the remaining appellees to answer as to their respective interests in said land, which interests, if any, it is alleged are junior to said lien. Issues were joined by answers in general denial. A trial was had by the court, which resulted in a judgment in favor of appellant for \$4,432.56, and an order on the receiver of the South Shore Manufacturing Company, who was a party defendant, to pay the same out of the proceeds in his hands for distribution as a general claim, under the order of the court. The foreclosure of the alleged mechanic's lien was denied. Appellant filed a motion for a new trial, and subsequently filed a supplemental motion therefor. Appellees filed a motion to strike out the supplemental motion for a new trial, which was sustained, and the court thereupon overruled the original motion for a new trial, to each of which rulings appellant excepted,

and has assigned said rulings of the court as the errors on which it relies for reversal.

The record discloses that the decision of the trial court was rendered in this cause on December 29, 1915.

On January 27, 1916, appellant filed its motion

1. for a new trial, and subsequently on June 1, 1916, it filed a supplemental motion for a new trial on the ground of newly-discovered evidence, which it alleges could not have been discovered by the exercise of reasonable diligence in time to have introduced the same at the trial of the cause. As pertinent to the action of the court in striking out appellant's supplemental motion for a new trial, it should be noted that §587 Burns 1914, Acts 1913 p. 848, provides that an application for a new trial may be made at any time within thirty days from the time the verdict or decision is rendered, and not afterwards. It has been held that this section of the statute is mandatory, as to the time of filing a motion for a new trial. *Talbot v. Meyer* (1915), 183 Ind. 585, 109 N. E. 841; *Acme White Lead, etc., Works v. Indiana Wagon Co.* (1916), 61 Ind. App. 644, 112 N. E. 392. It has also been held that a supplemental motion for a new trial may be filed within the time provided by statute for filing an original motion for such purpose. *Fisher v. Southern R. Co.* (1914), 55 Ind. App. 599, 104 N. E. 521. But we have not been able to find any authority in this state for filing such a motion after the expiration of the time for filing an original motion for a new trial. However, a party who discovered a cause for a new trial, after the expiration of the time fixed for filing a motion therefor, is not without a remedy, as the legislature by §589 Burns 1914, §563 R. S. 1881, has provided for such a contingency.

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In view of the language used in said §587, *supra*, the decisions cited, and the provision of said §589, *supra*, we are led to conclude that the filing of said supplemental motion for a new trial, more than thirty days after the decision of the court on the merits of the cause, was unauthorized, and the court did not err in striking it out.

The only question presented by the appellant involving the action of the court in overruling its motion for a new trial is based on a failure to include

2. in the amount of recovery any sum as interest on the claim sued on. A determination of this question would require a consideration of the evidence, which an examination discloses is not in the record. The transcript shows that appellant's motion for a new trial was overruled on November 8, 1916, the same being the twenty-seventh judicial day of the October, 1916, term of the Lake Superior Court, at which time it was given sixty days in which to file its bill of exceptions; that thereafter on January 8, 1917, it presented to the trial judge the typewritten manuscript which now appears with the transcript as a bill of exceptions containing the evidence; that said judge did not then approve the same, but took it under advisement, and later, on March 17, 1917, approved the same, and attached his certificate thereto evidencing such fact; and that thereafter on May 16, 1917, such completed bill was filed in the office of the clerk of the Lake Superior Court. We
3. know judicially that the October, 1916, term of the Lake Superior Court expired in November of that year. It thus appears that the bill
4. of exceptions containing the evidence was not filed during the term at which the motion for a

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new trial was overruled, nor within the time given beyond such term for that purpose, nor was it presented to the judge of the trial court for his approval within such time. Under these circumstances, such bill of exceptions cannot be considered a part of the record. *Cornell v. Hallett* (1895), 140 Ind. 634, 40 N. E. 132; *Indiana, etc., Oil Co. v. O'Brien* (1903), 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; *City of Huntington v. Boyd* (1900), 25 Ind. App. 250, 57 N. E. 939; *Brown v. American Steel, etc., Co.* (1909), 43 Ind. App. 560, 88 N. E. 80; *Haehnel v. Seidentopf* (1916), 63 Ind. App. 218, 114 N. E. 422; *Huntingburg Bank v. Morgenroth* (1917), 64 Ind. App. 315, 115 N. E. 798; *Beard v. Fenton*, (1918), 67 Ind. App. 605, 119 N. E. 495.

There is still another reason why such bill of exceptions cannot be considered in determining the question, which appellant asserts renders the action

5. of the court in overruling its motion for a new trial error. The bill of exceptions, while purporting to contain all the evidence given on the trial of the cause, shows on its face that a certain paper, designated as a "contract," and marked "Exhibit No. 3" for identification, was admitted and read in evidence, but said exhibit does not appear in such bill of exceptions. This fact would prevent a consideration of the question which appellant seeks to present. *Ward v. Bateman* (1870), 34 Ind. 110; *Weaver v. Kennedy* (1895), 142 Ind. 440, 41 N. E. 810; *Jordan v. Muth* (1892), 6 Ind. App. 655, 34 N. E. 29; *Collins v. Collins* (1885), 100 Ind. 266; *Rhea v. Crunk* (1894), 12 Ind. App. 23, 39 N. E. 879; *Eichel v. Bower* (1891), 2 Ind. App. 84, 28 N. E. 192. But if the alleged bill of exceptions accompanying the transcript had been duly

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presented, approved and filed, so that it could be considered as a part of the record, and nothing appeared on its face to disclose that it did not contain all the evidence, still we could not sustain appellant's contention relating to its right to have the court include a sum for interest in the amount of its recovery.

6. If appellant believed it was entitled to recover interest, the duty rested upon it to establish such fact by the evidence, and to furnish proper data from which the amount thereof could be computed, as the court was not permitted to speculate in that regard. *Green v. Macy* (1905), 36 Ind. App. 560, 76 N. E. 264; *Connersville Wagon Co. v. McFarlan Carriage Co.* (1906), 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; *Williams v. Pittsburgh, etc., R. Co.* (1918), 68 Ind. App. 93, 120 N. E. 46; *Bilskie v. Bilskie* (1919), 69 Ind. App. 595, 122 N. E. 436.

An examination of the alleged bill of exceptions fails to disclose the contract out of which it is alleged appellant's claim arose, hence we are unable to

7. ascertain whether such contract provided for interest, and, if so, when, by its terms, it should begin to run, and the rate thereof. It does not contain any evidence of demand for, or vexatious delay in payment, or of any other fact from which the trial court could determine whether anything was due appellant as interest, and, if so, the amount thereof. For the reasons stated, appellant has failed to show any error in overruling its motion for a new trial.

We find no error in the record. Judgment affirmed.

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Thompson v. Patten—70 Ind. App. 490.

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## THOMPSON v. PATTEN ET AL.

[No. 9,877. Filed June 17, 1917.]

1. *WILLS.—Conditions.—Restraint of Marriage.—Vesting of Estate Devised.*—Where a particular estate has been devised to a wife upon condition that she shall not remarry, the condition is void, and the estate vests and is held as if it had not been coupled with the condition. p. 491.
2. *WILLS.—Devise by Husband to Wife During Widowhood.—Validity.*—A husband may devise to his wife an estate to continue during her widowhood. p. 491.
3. *WILLS.—Conditions.—“Restraint of Marriage.”—Statute.—Limitation of Estate.*—Where testator devised all his property to his wife “to remain her absolute property as long as she remains my widow,” but in event she “should remarry, all of my property shall go to my children,” is not a condition in “restraint of marriage” within the terms of §3123 Burns 1914, §2567 R. S. 1881, providing that a devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void, the words used amounting only to a limitation of the estate devised. p. 491.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by Hanna Thompson against Myrtle Patten and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*John F. Regester*, for appellant.

*Edwin Corr*, for appellees.

McMAHAN, J.—The appellant commenced this action to quiet her title to certain real estate in Monroe county, which was owned by John Thompson at the time of his death. The appellant is the widow, and the appellees are the children and consorts of children of John Thompson, who died leaving a will reading as follows:

“Item 1. I will, devise and bequeath all of my property real and personal to my wife Hannah Thompson to be and remain her absolute property as long as she remains my widow.

“Item 2. In the event my said wife Hannah Thompson should remarry, all of my property shall go to my children, share and share alike.”

The only question presented for our determination is whether the provisions in the above will amount to a condition in restraint of marriage. If they do, the appellant is the owner of the fee-simple title to the real estate in controversy, and this cause will have to be reversed.

Section 3123 Burns 1914, §2567 R. S. 1881, provides that “A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void.”

It requires the citation of no authorities to uphold the statement that, where a particular estate has been devised to a wife upon condition that such wife

1. shall not remarry, the condition is void, and the estate devised vests, and the same is held as if it had not been coupled with the condition. It
2. is also just as well settled that a husband may devise to his wife an estate to continue during her widowhood, and that he is not obliged to devise to her a larger estate.

We have no hesitancy in saying that the provisions of the will now under consideration are not conditions in restraint of marriage, but amount only to a

3. limitation of the estate devised, and we would rest our decision upon this statement without further discussion or citation of authorities were it not for the fact that appellant’s counsel, by brief and

on oral argument, earnestly insist that the provision relating to the remarriage is a condition, and that the appellant became the owner of the real estate in fee.

In *Hibbits v. Jack* (1884), 97 Ind. 570, 49 Am. Rep. 478, the Supreme Court, after an exhaustive discussion of the meaning of the words "condition" and "limitation," held that a devise of lands to the testator's wife "so long as she shall remain my widow" contains no condition in restraint of marriage, but a mere limitation, and if she marry, or, not marrying, dies, the land goes to the heirs of the testator.

In *Summit v. Yount* (1887), 109 Ind. 506, 9 N. E. 582, the court had before it a will which read as follows: "I will and bequeath to my wife, Sarah Radcliff, all my estate, both real and personal, so long as she remains my widow. But, in case of her again marrying, I will to her one-third of all my effects, to hold as her own and for her sole benefit as she may desire; and, in case of said subsequent marriage of my said wife, I devise and will," etc.

The court, on page 508, quoted from 4 Kent, Com. 126, as follows: "'Words of limitation mark the period which is to determine the estate; but the words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate.'" And continuing on page 509, the court said: "This statement of the distinction between words of limitation and words of condition, of itself,



settles the point of contention under consideration adversely to the views and argument of appellant's counsel, in the case now before us. The words, 'so long as she remains my widow,' are in the strictest sense words of limitation, and not of condition. Clearly and unequivocally, these words specify the widowhood of appellant as the utmost time of continuance of the estate devised to her; and they do not mark or indicate any event, the occurrence of which, in the intermediate time, will defeat such estate." See, also, *Wood v. Beasley* (1886), 107 Ind. 37, 7 N. E. 331; *Levengood v. Hoople* (1890), 124 Ind. 27, 24 N. E. 373; *Beatty v. Irwin* (1905), 35 Ind. App. 238, 73 N. E. 926.

The court properly sustained the demurrer to the complaint. Judgment affirmed.

CONCURRING OPINION.

DAUSMAN, J.—I concur in the result because of the prior decisions. Under the rule of *stare decisis*, the decision herein is right; but I am of the opinion that the precedents are wrong, and that the distinction between a condition and a limitation is wholly without merit.

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KINGAN AND COMPANY v. ALBIN, ADMINISTRATRIX.

[No. 9,800. Filed June 18, 1919.]

1. **APPEAL.**—*Review.*—*Ruling on Motion for Judgment on Interrogatories.*—*Scope of Review.*—In determining the correctness of the action of the trial court in overruling defendant's motion for judgment on the interrogatories, the court on appeal can consider only the complaint, answer, general verdict and answers of the jury to the interrogatories. p. 496.

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2. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.—Presumptions.**—The general verdict necessarily determines all the material issues in favor of the successful party, and, unless the answers to the interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, it must prevail; all presumptions being indulged to sustain the general verdict, but none in favor of the answers to the interrogatories. p. 499.
3. **MASTER AND SERVANT.—Injuries to Servant.—General Verdict.—Answers to Interrogatories.**—In an action for the death of a packing-house employe, killed in a hog-scraping machine, where the general verdict was for plaintiff, the jury's answers to interrogatories cannot be construed as showing that the voluntary act of the deceased was the proximate cause of his death in the absence of any findings disclosing how the accident happened. pp. 501, 503.
4. **MASTER AND SERVANT.—Injuries to Servant.—Failure to Guard Dangerous Machinery.—Negligence Per Se.**—Failure to guard a dangerous machine, as required by statute, where it is practicable to do so without destroying its usefulness, generally constitutes negligence *per se*. p. 502.
5. **MASTER AND SERVANT.—Injuries to Servant.—Answers to Interrogatories.—Contributory Negligence.**—In an action for the death of a packing-house employe killed in a hog-scraping machine, answers to interrogatories showing that the accident was caused by deceased being struck by an iron bar, but not showing what he was doing at the time, *held* not to show that he was guilty of contributory negligence. p. 503.
6. **APPEAL.—Review.—Answers to Interrogatories.**—In determining whether the jury's answers to interrogatories are sufficient to overthrow the general verdict, the court on appeal must accept the answers as being true. p. 504.
7. **TRIAL.—Interrogatories.—Duty of Jury.—Failure to Agree.—Discharge.**—When there is any evidence on the subject embraced in an interrogatory, it is the duty of the jury to make answer thereto in accordance with the preponderance of the evidence, but in the absence of evidence on the subject-matter of an interrogatory, the jury has the right to answer, "No evidence." and, if the jury is unable to agree upon the answers to interrogatories, the court should discharge it on account of such disagreement, the same as where the jury fails to agree on a general verdict. p. 506.
8. **TRIAL.—Special Interrogatories.—Refusal to Submit.—When Harmless.**—A party submitting proper interrogatories has the right to have them answered fairly and fully, but it is not available error for the court to refuse to require the jury to retire and

- make more definite answers, where the answers demanded would not, if given, change the result of the judgment rendered. p. 506.
9. **TRIAL.**—*Special Interrogatories.*—*Answers not Sustained by Sufficient Evidence.*—*Remedy.*—If the jury's answers to interrogatories are not sustained by sufficient evidence, the remedy is by motion for new trial, and not by motion to require the jury to make further answers. p. 507.
10. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Failure to Guard Dangerous Machinery.*—*Directing Verdict.*—In an action for the death of a packing-house employe killed in a hog-scraping machine alleged not to have been guarded as required by statute, the refusal of the court to direct a verdict for plaintiff was proper, where the evidence conclusively showed that the machine was not guarded, and that it could have been guarded without interfering with its usefulness. p. 508.
11. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Contributory Negligence.*—*Burden of Proof.*—In an action against the master for the wrongful death of a servant, the burden of proving contributory negligence is on the master. p. 508.
12. **APPEAL.**—*Review.*—*Refusal of Instructions.*—It is not error to refuse requested instructions which are fully covered by others given. p. 509.
13. **APPEAL.**—*Review.*—*Refusal of Instructions.*—*Inapplicability to Evidence.*—In an action for wrongful death due to unguarded machinery, a requested instruction that the owner of dangerous machinery was under no obligation to guard it while repairs were being made, although correct as an abstract proposition of law, was properly refused, where there was no evidence to which it was applicable. p. 509.
14. **APPEAL.**—*Review.*—*Harmless Error.*—*Incorrect Instruction.*—In an action for wrongful death, the giving of an instruction incorrectly defining the "burden of proof" was not reversible error, in the absence of any claim that the jury was thereby misled to the disadvantage of appellant. p. 511.
15. **NEGLIGENCE.**—*Proximate Cause.*—Proximate cause is an act which immediately causes or fails to prevent an injury which might reasonably have been anticipated would result from such negligent act or omission. p. 511.
16. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Action.*—*Evidence.*—*Sufficiency.*—In an action for the death of a packing-house employe killed in an unguarded hog-scraping machine, evidence held sufficient to justify a finding that deceased slipped and fell into the machine while stooping over to take something from under it, and that, if the machine had been guarded, the accident would not have happened. p. 512.

From Marion Superior Court (97,567); *James A. Ross*, Special Judge.

Action by Matilda Albin, administratrix of the estate of Anthony Albin, deceased, against Kingan and Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Samuel D. Miller, Frank C. Dailey and William H. Thompson*, for appellant.

*Louis H. Flinn and J. R. Cauble*, for appellee.

MCMAHAN, J.—This was an action for damages commenced by the appellee, as administratrix of the estate of Anthony Albin, to recover damages sustained by reason of the death of said Anthony Albin, alleged to have been caused by the negligence of appellant in failing to guard a certain hog-scraping machine. The case was tried by a jury, and resulted in a verdict and judgment in favor of appellee. The jury, in connection with their general verdict, answered certain interrogatories. The appellant's motion for judgment on the interrogatories notwithstanding the general verdict was overruled. Appellant filed a motion for a new trial, setting out thirty-seven specifications or reasons why a new trial should have been granted. This motion was overruled, and the errors assigned are that the court erred: (1) In overruling the motion for judgment on the interrogatories and answers thereto; and (2) in overruling the motion for a new trial.

In determining the correctness of the action of the court in overruling appellant's said motion for judgment, we can only consider the complaint,

1. answer, general verdict and answers of the jury to the interrogatories. *City of Jeffersonville v. Gray* (1905), 165 Ind. 26, 74 N. E. 611.

The complaint, after alleging that appellant is a corporation doing business in this state and that appellee is the duly appointed and qualified administratrix of the estate of Anthony Albin, reads as follows: "Plaintiff further avers that on the 11th day of February 1913, and for some time prior thereto, said defendant company was and is still engaged in the manufacture of meat products, pork-packing, and the general meat business in the city of Indianapolis, Indiana. That on the 11th day of February, 1913, and for some time prior thereto said defendant company had in its employ the said Anthony Albin, deceased, and more than five other employees." Plaintiff further avers that said decedent, Anthony Albin, was employed by said defendant company as a machinist, and as such machinist had charge of a certain machine and conveyor known as a "hog-scraping machine" and "hog-conveyor"; that it was his duty as such machinist to repair, adjust, clean and keep in order said hog-scraping machine and hog-conveyor and to run and operate said machine and conveyor. That said hog-scraping machine and hog-conveyor was composed of a series of sharp knives, sprockets, chains, gears, shafting and belting and was and is a dangerous machine and dangerous conveyor; that said machine and conveyor was unguarded and that there was no guard of any kind, character or description upon said machine and conveyor; that said machine and conveyor was operated by said defendant company in violation of the laws of the State of Indiana pertaining to unguarded machinery; that it was practicable to guard said machine and hog-conveyor without rendering it practically useless for its intended purpose.

“This plaintiff further alleges and says that on the 11th day of February, 1913, said decedent was attending said machine and conveyor and in conformity with the orders of said defendant company and that said machine and conveyor was being operated by said defendant company on said date. That while said decedent was so engaged about said machine and conveyor, and while in the line of his duties, said decedent fell into, upon, against, and came in contact with said dangerous, unguarded machine and conveyor, thereby crushing and lacerating his head, cutting off his skull, lacerating and tearing his right arm near the shoulder joint, killing him instantly. That said injuries and death resulted from the negligence and carelessness of the said defendant company in operating, and permitting and suffering to be operated said dangerous, unguarded machine, contrary to law as aforesaid. Plaintiff further avers that said decedent received the above described injuries which resulted in his death by the negligence and carelessness of the said defendant company in permitting, suffering and allowing and ordering said decedent to work upon or about said dangerous, unguarded machine and conveyor; that said injuries and death resulted wholly through the negligence and carelessness of the said defendant company as above described.”

It is also alleged that said decedent left surviving him his widow, Matilda Albin, and eight children; that said widow and two of the children were dependent upon him for their support, and demanding damages.

The answer was a general denial.

It is well settled that the general verdict necessarily determined all the material issues in favor of the

appellee, and, unless the answers to the interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, the court did not err in overruling the motion for judgment on the answers to the interrogatories. No presumptions are to be indulged in favor of the answers to the interrogatories, but all reasonable presumptions will be indulged to sustain the general verdict. *City of Jeffersonville v. Gray, supra*. The reason for this rule is well stated in *City of South Bend v. Turner* (1901), 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 200, as follows: "The jury is required to pronounce upon *all* the issuable facts proved in the case, while the court in testing the force of isolated facts disclosed by answers to interrogatories does not know, and cannot know, what other facts touching the same matters were rightfully before the jury to justify their verdict. Therefore, in conceding to the jury the presumption of right judgment, to overthrow its general verdict, the special facts returned must be of such a nature as to exclude the possible existence of other controlling facts, provable under the issues, relating to the same subject."

The jury, by their answers to the interrogatories, found the facts to be substantially as follows: Decedent was the foreman in charge of the machinery in question, and had been in charge of such machinery for many years; it was a part of his duty to make repairs to such machine, and just prior to his injury he and his assistant had finished doing so; he then told his assistant to start the machine; to do so it was necessary for decedent's assistant to pass out of his sight; said assistant, when starting the machine, was

not at a place where decedent could see him; when he directed his assistant to start the machine, decedent was standing several feet from the place where he met his death. It was necessary for decedent, in order to put himself in a position where he could come in contact with said machine, to walk several feet from the place where he was last seen alive; the portion of the machine in which the accident occurred was upon a raised platform above which were two iron or steel shafts, one about 9½ inches above the other; the platform below these shafts was about one foot, 5½ inches above the floor at the south end and was about eleven inches above it at the north end. There was a wooden bar known as the shifter bar about 11½ inches south of the lower shaft; the accident was caused by decedent being struck on the head by an iron bar attached between two descending chains; decedent and his assistant had been inside said machine on said platform a short time before the accident to adjust said machine, which was not in motion at the time they were in the same prior to the accident. Had there been a gate or door north of the machine, it would have been necessary to have opened or removed said gate or door in order to enter the machine to make repairs; decedent was familiar with the mechanism of the machine; the machine was five feet, ten inches wide; the platform on which shafting stood was about four feet, eleven inches deep from north to south. The distance between the two sprocket chains was about two feet and eight inches, and from the sprocket chains to the outside of the north edge of the platform was one foot and seven inches. The bars on the sprocket chains were about nine feet and six inches apart; the chains when in motion moved



about 142½ feet a minute; the machine was started and stopped by a shifter lever which was on the platform nine feet above the floor, said platform being reached by a stairway; from the top of such stairway to the shifter lever was about twelve feet and three inches; the repair which decedent and his assistant had made consisted in replacing the sprocket chains on the sprocket wheel; decedent had often made this repair. Decedent had full authority to order this machine stopped or started at any time he deemed it desirable or necessary. Decedent could not have been in the position he was when injured had there been a door, gate, or other guard at the north end of said machine without opening or removing said door or other guard. Decedent did not have the authority, if he thought it necessary or desirable that the north end of said machine be guarded, to see that a guard was placed thereon; nor did he at any time cause a guard to be placed thereon, or suggest to defendant's construction department that the same be done. On several occasions prior to the accident in question, decedent had attempted to adjust said machine while same was in motion; when the chains were in operation they moved at a rate of speed such that fifteen bars would pass a given point per minute; these bars were about nine feet apart; the lower of the two shafts moved from south to north.

The appellant first contends that the "answers to the interrogatories show that the failure to guard the machine was not the proximate cause of the

3. accident because they show that if the machine had been guarded the decedent could not have placed himself in the position he was in when the accident occurred without removing the guard." Argu-

ing from this premise, appellant says that a guard would not have afforded any protection against the accident, as the voluntary act of the deceased must have been the proximate cause of his death. The objection to this contention is that appellant's logic is at fault. Not only is appellant's logic at fault, but the facts as found do not support its contention. The answers of the jury do not show what the deceased was doing when killed. There are no facts found to justify the conclusion that the accident was the result of any voluntary act of the deceased. In view of the general verdict, it would be more reasonable to say that the injury was the result of some involuntary act on the part of decedent, such as accidentally falling or slipping on a wet floor in passing alongside the unguarded machine.

The answers of the jury to the interrogatories do not disclose any facts or state of facts that throw any light on how the accident happened. Whether the deceased went back to the machine, after his assistant went upstairs, and started it for the purpose of watching it so as to see that it was in working order and slipped and accidentally fell into it, or whether he attempted to make some adjustment on the machine is not disclosed.

It will not do to say what might or might not have happened, or how it might have happened if the machine had been guarded. The answer to appellant's contention is that the jury by their general verdict found that the machine was not guarded, and that it was practicable to have guarded it without practically destroying its usefulness for the purpose for which it was intended. Such a failure is a

4. plain breach of the duty owing to the employe, and generally constitutes negligence *per se*.

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*Monteith v. Kokomo, etc., Co.* (1902), 159 Ind.

3. 149, 64 N. E. 610, 58 L. R. A. 944; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 73 N. E. 899. The purpose of the legislature in enacting the statute requiring dangerous machinery to be guarded was to prevent accidents. The jury by their general verdict found that the absence of a proper guard was the proximate cause of the accident. Such a conclusion and finding is not unwarranted. To hold that the absence of such a guard cannot be the proximate cause of an injury would be to destroy the statute. A proper guard might not have prevented the accident, but it would have relieved appellant from all liability on account of a failure to comply with the statute. As said by this court in *Tucker, etc., Mfg. Co. v. Staley* (1907), 40 Ind. App. 63, 80 N. E. 975: "So far as the question of proximate cause is concerned, it is not necessary that appellant should have anticipated the particular injury which resulted. *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413. It is quite sufficient that the performance of the statutory duty might, and as the jury found would, have prevented it. The question, as before stated, was one of fact, and no amount of logic authorizes us to disregard the verdict."

The appellant also contends that the answers of the jury to the interrogatories show that the deceased was guilty of negligence which contributed to

5. his death. This contention is based upon the theory that the deceased was working with the machine while it was in motion, and that he ought to have stopped the machine before undertaking such work. We cannot agree with appellant in this contention. The facts as found do not show that deceased

was working with the machine, or attempting to do anything with it, at the time of the accident. They only show that the deceased and his assistant had been making some repairs or adjustments a short time before the accident; that they had the repairs completed; that the assistant had gone upstairs and started the machine, at which time the decedent was standing several feet from the machine; that the accident was caused by deceased being struck on the head by an iron bar attached between two descending chains on the machine. There are no facts showing what the deceased was doing, or that he did, or failed to do anything that could be construed as showing that he was guilty of contributory negligence.

Several interrogatories were submitted to the jury, the purpose of which was to elicit facts showing that the deceased was guilty of contributory negligence, and which, if answered in favor of appellant, would have shown deceased guilty of negligence, which was the proximate cause of the accident, but the jury answered each of these interrogatories, "No evidence." In determining whether the interrogatories

and the answers thereto are sufficient to over-

6. throw the general verdict, we are not concerned about the truthfulness of the answers. We must accept them as being true. There are no facts found by the jury showing that deceased was guilty of contributory negligence. There was therefore no error in overruling appellant's motion for judgment on the interrogatories.

Did the court err in overruling appellant's motion for a new trial?

When the jury returned into court with their general verdict and answers to the interrogatories appel-

lant filed a motion asking the court to require the jury to retire and make further answers to interrogatories Nos. 11, 13, 15, 18, 19, 20, 23, 27, 41, 48, 53 and 54. This motion was sustained as to Nos. 18, 19, 20, 27, 48, 53 and 54, and overruled as to Nos. 11, 13, 15, 23 and 41. The jury, having retired, again returned into court with their general verdict and answers to interrogatories, and appellant filed another motion asking the court to require the jury to retire and make further answer to interrogatory No. 54, which motion was overruled. The action of the court in refusing to require the jury to make further answer to interrogatories Nos. 11, 13, 15, 23, 41 and 54 is set out as ground for a new trial.

These interrogatories and the answers thereto are: (11) Did the decedent, immediately before the accident in question, voluntarily step upon the platform? A. No. evidence. (13) Did decedent put his head between these two shafts while the machine was in motion? A. No evidence. (15) Did the decedent step upon said platform at the north end? A. No evidence. (23) Would the accident have occurred if decedent had caused the machine to be stopped before going into it at the time of his accident? A. No evidence that he went in at the time of accident. (41) Upon each occasion when this repair or adjustment was made, did the decedent or his assistant or both of them, go into the machine from the same direction that decedent entered it immediately prior to the accident in question? A. No evidence. (54) When said machine was in motion was such fact perfectly obvious to one looking at it when within eight feet from the north end thereof? A. No evidence. (This is the first answer returned to said interrogatory No. 54.)

The jury reconsidered No. 54, and made the answer thereto read as follows: "No evidence as to eight feet," and after being so answered, the court refused to require the jury to retire again and make further answer to such interrogatory.

Appellant's motion was that the jury be required to retire and make further answer to each of said interrogatories for the reason that "there was evidence introduced in the course of the trial from which each of said interrogatories could and should have been answered otherwise than as they were answered." Appellant insists that each of these interrogatories was proper, and that there was evidence on the subject inquired about in each interrogatory; that Edward McCloud, who was one of appellant's witnesses, testified as to the facts asked about.

If there is any evidence on the subject embraced in an interrogatory, it is the duty of the jury to answer such interrogatory in accordance with the pre-

7. ponderance of the evidence. If the jury are unable to agree upon the answers to interrogatories, the court should discharge the jury on account of such disagreement, the same as in a case where the jury fails to agree on a general verdict. If there is no evidence on the subject embraced in the interrogatory, the jury then has the right to answer, "No evidence." *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435, 67 N. E. 183.

A party submitting proper interrogatories has the right to have them answered fairly and fully (*Indiana Union Traction Co. v. Swafford* [1913], 179

8. Ind. 279, 100 N. E. 840), but it is not available error for the court to refuse to require the jury to retire and make more definite answers, if the

answers demanded would not, if given, change the results of the judgment rendered. *Cleveland, etc., R. Co. v. Asbury* (1889), 120 Ind. 289, 22 N. E. 140.

Appellant's real contention is not that the answers are defective or indefinite, but that they are not sustained by the evidence. If the answers of the

9. jury to interrogatories are not sustained by sufficient evidence, the remedy is by motion for a new trial, and not by motion to require the jury to make further answers. There was therefore no error in overruling the motion to require the jury to make further answer to said interrogatories. *Frank Bird Transfer Co. v. Krug* (1903), 30 Ind. App. 602, 65 N. E. 309

The appellant next contends that the answers to interrogatories Nos. 46, 53 and 54 are not sustained by sufficient evidence. These interrogatories and answers are as follows: (46) Did the decedent have the authority, if in his opinion it was necessary or desirable that the north end of said hog-scraping machine should be guarded, to see that a guard was placed thereon? A. No. (53) Did the accident occur while the decedent was attempting to make some adjustment of said machine while the same was in motion? A. No. (54) When said machine was in motion was such fact perfectly obvious to one looking at it when within eight feet from the north end thereof? A. No evidence.

It is clear that, even though the jury had answered Nos. 46 and 54 in the affirmative, such answers would not have controlled the judgment. A different judgment would not have been rendered as a result of such affirmative answers.

Interrogatory No. 53 is double. The evidence showed without conflict that the machine was in mo-

tion at the time of the accident, but there was no evidence that the deceased was making any adjustment of the machine at the time of the accident. The evidence without conflict showed that the chains which operated the machine had been thrown off the sprocket wheel; that the machine had been stopped; that the deceased and his assistant had loosened the take-ups, put the chain back on the sprocket wheel, and tightened the take-ups; that all adjustments and repairs had been made before the accident. No witness testified that the deceased was making any adjustments of the machine at the time of the accident. The only witness who claimed to have seen the accident did not testify that the deceased made any adjustment, or attempted to make any adjustment, after the machine was started. The statement of the witness was that the deceased stepped on the platform and stooped over as if he were going to rake something out, and that the witness supposed he was raking hog hair. The jury might truthfully have answered this question by saying that there was no evidence that the deceased was attempting to make any adjustment of the machine at the time of the accident.

Complaint is next made of the refusal of the court to give certain instructions tendered by appellant.

Instruction No. 1, tendered by appellant, asked the court to instruct the jury to return a verdict for appellant. This was properly refused. The

10. evidence conclusively showed that the machine which caused the death of deceased was not guarded, and that it could have been guarded
11. without in any manner interfering with its usefulness. One witness testified to a state of



facts which would have justified the jury in finding that the deceased was guilty of contributory negligence, but there were circumstances surrounding this testimony which might have warranted the jury in not believing the witness. The burden of proving contributory negligence was on appellant.

Instructions Nos. 3, 4, 7 and 9, tendered by appellant, were fully covered by the instructions given by the court. No. 8 was properly refused, as there

12. was no evidence to which it was applicable.

By this instruction the court was asked to instruct the jury that there was no obligation on

13. the owner of dangerous machinery to guard it while repairs were being made. This is correct as an abstract proposition of law, but the evidence was uncontradicted that the repairs or adjustments of the machine were completed before the accident, and that the deceased and his assistant had left the machine. There is no evidence that the deceased afterwards undertook to make any repairs, or that he was making any repair or adjustment when he was killed.

Instruction No. 3, given by the court on its own motion, was in part as follows: "By burden of the proof is meant a preponderance of the evidence. Such preponderance is not necessarily the greater number of witnesses testifying to any one fact, but the evidence applying to that particular fact which is greater in weight and credibility.

"If after considering all the evidence in the cause you should find that the evidence on any given question is evenly balanced, you should find on that question against the party having the burden on such issue, for in such case there would be no preponderance in favor of such proposition."

The definition of the “burden of proof” is not correct, but there is no claim that the giving of this

14. instruction misled the jury to the disadvantage of appellant. Its giving was not reversible error.

Instruction No. 6 was as follows: “‘Proximate cause’ may be defined as an act which immediately causes or fails to prevent an injury which  
15. might reasonably have been anticipated would result from such negligent act or omission.”

This is a correct statement of the law. *Evansville Hoop, etc., Co. v. Bailey* (1909), 43 Ind. App. 153, 157, 84 N. E. 549.

We have examined all the instructions given of which complaint is made, and find no reversible error.

The next contention of appellant is that the verdict is not sustained by sufficient evidence. That the appellant was negligent in failing to guard the machine that caused the deceased's death is not seriously questioned. The evidence, without conflict, is that it was not guarded, and that it could have been guarded without interfering with its usefulness; that the machine was stopped while the deceased and his assistant made some adjustments; that when the adjustments were made the assistant stepped to his place about twelve feet from the machine, and out of sight of the deceased, and started the machine; that after the machine had been running about two or three minutes the assistant heard a noise as if something was wrong with the machine; that he stopped the machine and went to investigate, finding the deceased, head foremost in the machine dead. The only question remaining in the case for further consideration is whether the deceased was guilty of negligence

which proximately contributed to his death. The burden of proving contributory negligence was on the appellant.

Edward McCloud was a witness for appellant, and was the only witness who claimed to have been present and to have seen the accident. At the time of the trial he was a prisoner in the Marion county workhouse, and his testimony was given in a deposition which was read to the jury. He testified that he was thirty-seven years of age; that he was working for appellant at the time the deceased was killed; that he saw the accident; that when he first saw the deceased, he, deceased, was standing right down in front of the hog-scraper and was off the platform and about three feet from the machine; that he had just come out from under there and told his helper, Arnold Cornelius, to start the machine; that the helper went upstairs and started the machine; that the reason witness was down on the floor where the accident happened was that the machine was stopped, and that he just walked around downstairs looking around; after the helper went upstairs the deceased stopped there a few moments looking, and then he went ahead and went under the machine like he was going to rake something out; that was after he told the assistant to start it; he had been under there once, and had come out and told his assistant to start it; that is when he went back the second time; there was the machine and iron rods that go across and a little platform that he could step on; the platform was about two feet wide and not over 1½ feet high; he just stepped on the platform and stuck his head right down under there when his foot slipped; the machine was going then; had been going about five minutes; he

stuck his head under there like he was raking something out; supposed he was raking hog hair; saw the thing catch him; saw his foot slip and he fell in the machine; he was taken out dead; his head was cut off; stood there and watched him five minutes; saw him two or three minutes before the machine started; he walked up there to work in the machine; he was through working on the machine; was raking something out from under there when his foot slipped; he stuck his head in between two rods there; is all he saw. Witness said that he "hollered 'there is a man in the machine.' "

Appellant contends that the deceased was attempting to make some repairs or adjustments on the machine while it was in motion and that, even if

16. the same had been guarded, that would not have prevented the accident. The objection to this argument is that it is simply a conjecture. It is a sufficient answer to say that there is no evidence that deceased was attempting to make any repairs or adjustments at the time of his death. The jury were justified in finding that he stooped over to rake something out from under the machine, and that in so doing he slipped and fell into the machine, being instantly killed, and that, if there had been a gate or guard in front of the machine, as explained by the witnesses, the accident would not have happened.

We find no reversible error in the record. Judgment affirmed.

## MCBETH-EVANS GLASS COMPANY v. BRUNSON.

[No. 9,764. Filed May 13, 1919. Rehearing denied June 18, 1919.]

1. MASTER AND SERVANT.—*Injury to Servant.—Action.—Complaint.—Sufficiency.*—In an action by a glass-blower against a glass company for personal injuries, paragraphs of complaint alleging that plaintiff's eyes were injured through defendant's negligence in permitting poisonous dust and fumes to escape from its mixing room into the room where plaintiff was working, and by reason of being exposed to intense radiated heat, against which plaintiff was not instructed how to protect himself, *held* good as against demurrer. p. 515.
2. MASTER AND SERVANT.—*Injury to Servant.—Action.—Instructions.—Ignoring Issues.—Proximate Cause.*—In an action by a glass blower against a glass company for injuries alleged to have been caused by defendant's negligence in permitting poisonous dust and fumes to escape from its mixing room into the room where plaintiff was working, an instruction that, if plaintiff, because of such poisonous dust, had been injured in his general health, and as a result of the condition of his general health he suffered cataracts of the eyes, though not expressly stating that the jury must find the condition of plaintiff's health resulting in cataracts was produced by the poisonous gas, etc., *held* neither misleading nor objectionable as directing a particular verdict for plaintiff upon presupposed acts of negligence therein set forth and omitting the essential element of proximate cause. p. 522.
3. MASTER AND SERVANT.—*Injury to Servant.—Action.—Instructions.—Contributory Negligence.*—In an action by a glass-blower for personal injuries, an instruction that the jury must find, before they would be warranted in returning a verdict for plaintiff, that he had no knowledge that breathing the poisonous dust, gases and fumes, which injured his general health and caused cataracts to form on his eyes, was injurious to him, was not erroneous as omitting the element of contributory negligence, since, without knowledge of the effect of the dust, etc., on his health, plaintiff could not have been guilty of contributory negligence in continuing in his work. p. 523.
4. NEGLIGENCE.—*Negligence per se.—Violation of Statute.*—Where the acts and omissions complained of, in a servant's action against the master for personal injuries, were a matter of statutory duty, defendant's failure to observe the statute was negligence *per se*. p. 523.
5. MASTER AND SERVANT.—*Injury to Servant.—Negligence.—Failure to Comply with Statute.*—If a glass company knew of the pois-

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- onous nature and deleterious effect of gases and dust which it allowed to escape from its mixing room, and permitted the continued exposure of workmen thereto, it was negligent, as a matter of law, under §3862d Burns 1914, Acts 1911 p. 599. p. 524.
6. **MASTER AND SERVANT.—Injury to Servant.—Negligence.**—If a glass company had no actual knowledge that poisonous gases and dust which it permitted to escape from its mixing room were injurious to employes, but by the exercise of reasonable care could have learned such fact, and yet allowed the partition between the mixing room and an adjoining one to become in disrepair, so that dust and gases passed through into the other room and affected workmen therein employed, the company was negligent in not ascertaining the facts as to the percolation of gas and dust, and in permitting further unnecessary exposure of its employes thereto. p. 525.
7. **MASTER AND SERVANT.—Injury to Servant.—Action.—Instruction.—Negligence.—Invading Province of Jury.**—In an action against a glass company by a glass-blower for injuries to his eyes from exposure to intense heat, an instruction that the company was guilty of negligence in ordering plaintiff to work where his eyes were subjected to such heat when he was in a "run-down condition of health," held erroneous as informing the jury that the giving of such order, under the circumstances alleged in the complaint, was negligence *per se*, whereas the question was one of fact for the determination of the jury. p. 525.
8. **TRIAL.—Instruction.—Predicating on Erroneous Instruction.**—An instruction predicated on other instructions previously given by the specific reference "as hereinbefore set forth," is bad, if any of such other instructions are erroneous. p. 527.

From Madison Circuit Court; *Luther F. Pence*, Judge.

Action by Earl S. Brunson against the McBeth-Evans Glass Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

*B. H. Campbell, F. E. Matson, Ralph K. Kane, James A. Ross, Robert D. McCord, L. R. Zapf and A. A. Schreiber*, for appellant.

*Kittinger & Diven*, for appellee.

ENLOE, J.—The complaint upon which this case was tried consisted of two paragraphs. To each of said

paragraphs separate demurrers were addressed for want of facts. The demurrers were overruled.

The errors assigned are: First, the overruling of the demurrer to the first paragraph of complaint. Second, the overruling of the demurrer to the second paragraph of complaint. Third, the overruling of the appellant's motion for a new trial.

The first paragraph of complaint is quite lengthy, but the material averments therein contained are:

That defendant is a corporation, engaged in

1. operating a glass factory at Elwood, Indiana, and has been so engaged for fifteen or twenty years, manufacturing lamp chimneys and other glass products; that it owns its own factory building and grounds, and employs from 100 to 300 men, in the various departments of its factory, in the operation thereof; that plaintiff entered the employ of said defendant some years ago, working first as a gatherer of molten glass, and later as a glass-blower, working in the blowing room; that adjacent to the blowing room defendant maintained a room known as a mixing room, where it mixed products, used in the manufacture of glass, in large troughs; that among the poisonous substances so there mixed were suboxide of copper, oxide of tin, white sand, pearl ash, saltpeter, arsenic, magnesia, soda-ash, lime, carbonate of soda, nitre, charcoal, lead and pearl ashes, which said substances were, during all of said time, mixed dry; that all of said substances were injurious to human beings who came in contact with them, and especially to the eyes of such persons.

That from the mixing of said poisonous substances in a dry and powdery state there arose a cloud of dust, which, if not confined and prevented from blowing

from said mixing room into the other departments of said factory, would permeate the atmosphere in other parts of said factory; that said dust was deleterious to health, and liable to injure the eyes and eyesight of human beings who were compelled to work in the air so permeated therewith.

That it was defendant's duty to confine said poisonous dust in said mixing room, and prevent the same from entering the other departments of said factory, and to protect its workmen from said dust, and keep the dust from said poisonous chemicals from entering the eyes and lungs of such employes; that the deleterious and injurious effect of the dust upon the eyes of human beings was well known to defendant at all times.

That between September, 1912, and June, 1914, plaintiff worked from time to time as a blower in the blowing room, and during said time his eyes and his eyesight became affected and injured from the dust permeating the air and atmosphere in the blowing room, coming from the mixing room, where said chemicals were so mixed; that he did not know said dust was injuring his eyes, or eyesight, or that it would injure them, until since he ceased work in June, 1914, but defendant did at all times know that the dust from said poisons, coming in contact with the eyes of its workmen, would injure them and destroy the sight thereof.

That said defendant could have prevented the employes from coming in contact with said poisonous dust, and avoided any injury to its employes and plaintiff therefrom, had said defendant kept the mixing room tightly closed and allowed no cracks or openings therein; that the defendant negligently and



carelessly allowed the partition between the blowing room and the mixing room to remain loose and open, with large cracks in the same, so that dust and fumes from the mixing room escaped through the same into said blowing room and permeated the air therein, and blew into plaintiff's face and eyes, while he was working therein blowing glass; that there were doors in said mixing room for the purpose of keeping the same closed, but said defendant, during all of said time negligently allowed and permitted said doors to be open, and said dust to escape through the same into the blowing room; that defendant during all of said time negligently suffered and permitted the partition shutting off the mixing room to be loose and insecure, and allowed large cracks and openings to remain in same, so that the same was at all times open and permitted the dust from said troughs and said poisonous chemicals to escape from the mixing room through said openings and through said doors into the blowing room, and into the plaintiff's face and eyes, thereby injuring his eyes and eyesight.

That plaintiff was engaged in blowing glass in said department of defendant's factory, and did not appreciate or know the danger thereof, and did not realize or know that his eyes were being injured from the poisonous air until the injury was done, his eyesight affected, and his general health impaired; that he has not worked in said factory since acquiring such knowledge.

That the said poisonous dust which so escaped through said faulty and negligently constructed walls of the mixing room into said blowing room, and into the face and eyes of plaintiff, did injure his general health and his eyes and eyesight and cause cataracts

to form over the pupils of his eyes so that his eyesight was seriously impaired, and he could not see to get about to work, and was compelled to quit work and go to an oculist for treatment for his eyes, at large expense; that he has been rendered practically blind, and his eyes and eyesight have been so injured that they cannot be cured; that his eyes before said time were in good condition, and he could see well to work and get about, and was able to earn three dollars, or more, per day.

That, by reason of the negligence of defendant in allowing the doors between said blowing room and said mixing room to be and remain open, and in allowing many large cracks and openings to remain in the wall, so as to permit said poisonous dust from said chemicals, while being so mixed therein, to escape from said mixing room into said blowing room, where plaintiff worked, the place where plaintiff worked was rendered unsafe and dangerous to him, all of which could have been avoided by the use of ordinary care and diligence on the part of said defendant.

The plaintiff had worked for defendant from time to time since 1905, working first as a gatherer and afterwards as a blower; that he worked in said blowing room in 1912, and to the early part of 1913, as a blower, when, on account of general bad health, he laid off until the autumn of 1913, when he again began working for defendant, and thereafter worked part of the time as a gatherer, and part of the time as a blower, as directed by defendant, in said blowing room; that defendant knew all the time, and could have known by the use of ordinary care, of all of said conditions herein alleged, and of said dangers to plaintiff from said gases, dust and fumes; that said

poisonous gases, dust and fumes work upon one exposed thereto in an insidious manner, and give no warning to the person exposed by causing any pain, and one unacquainted with the facts as to the action of this poison would not know of the injury being done him until it was done; that plaintiff was ignorant of the danger of said gases, fumes and dust, and had no notice or knowledge that it was from that source that his general health had become impaired and his eyes injured.

That, by reason of the facts herein alleged, the place in which he was compelled to work was a dangerous and unsafe place in which to work, which fact plaintiff did not know, and which fact defendant did at all times know, or could have known by the use of ordinary care; that the said injuries to plaintiff were caused and brought about by the negligence and carelessness of defendant in failing to furnish plaintiff a safe place in which to work, as aforesaid; that plaintiff is twenty-nine years of age, and his eyesight is permanently impaired, and his general health impaired; that said injury to his eyes and loss of his sight was caused and brought about by the negligence and carelessness of defendant, as herein averred, and not otherwise.

Then follows a statement of special damages, and the paragraph concludes with prayer for damages in the sum of \$20,000.

The second paragraph of complaint charges the same general acts of negligence charged in the first paragraph of complaint, and it also contains two additional charges of negligence, viz.: (1) Negligence in not instructing plaintiff as to the dangers to his eyes, when the same were, during the course of his employ-

ment, exposed to intense radiated heat. This negligence is charged in the following language: "That in working at said trade as a gatherer, or said trade as a blower, he was exposed to an intense heat. That said radiated heat has a tendency to affect and cause diseases of the eyes, of which fact plaintiff had no notice or knowledge until since this suit was filed, and he was never informed of said fact by defendant, who well knew of said fact. That to resist said tendency to cause disease of the eyes, the workman should be instructed how to protect himself, but plaintiff was not so instructed and defendant negligently failed to instruct him as to the danger to his eyes from exposure of them while working where he was exposed to intense heat, as herein set out; and to resist the same the employe should remain in the best of health. That if the employe is working and exposed to said heat and becomes from other causes weak and debilitated, then he becomes more susceptible to disease of the eyes from said work and exposure to heat." (2) The alleged negligence of the defendant in causing him to work where he was exposed to great heat, at a time when he was in a general run-down condition of health, is charged in the following language: "That plaintiff not having been warned, instructed, or informed of any of said facts, kept working as aforesaid as a gatherer and blower in said blowing room of said defendant's factory, and frequently after his regular hours as a gatherer or blower he was compelled to and did work from one and a half to three hours in setting pots, which was difficult work and exposed his body and his eyes to great heat. That on account of plaintiff working in said blowing room, as aforesaid, and inhaling said

dust, gases and fumes, as aforesaid, and on account of said overwork in assisting in setting said pots as aforesaid, plaintiff's general health was injured and impaired, and he became weak, sick and debilitated, which condition of health crept upon him so insidiously that before he realized it he was in said condition, without knowledge or notice of the cause thereof. That he had made said business of gathering and blowing glass his trade while working for the defendant and had to rely upon his said work to support himself and family. That when he would become weakened and have to quit work he would take a rest and regain his health to some extent and then again go to work, as aforesaid, without any knowledge or notice of what was causing his bad health. That knowing nothing about and having no notice that said heat had a tendency to cause disease of the eyes, and that his general bad health would make him more liable to contract said disease of the eyes, he kept on working as aforesaid, until June, 1914, and from such work contracted a disease of the eyes which has rendered him almost blind and made it impossible for him to work or to earn money. That he cannot get about except by the help of others." Special damages are then alleged, and this paragraph concludes with the prayer for damages in the sum of \$20,000.

Each paragraph of this complaint is good, and the demurrers thereto were properly overruled.

Appellant also urges that the trial court erred in overruling its motion for a new trial. By its fourth specification, in its motion for a new trial, the appellant says: "The court erred in giving to the jury instruction No. 2 as requested by the plaintiff, and given by the court, which instruction was No. 3 of those read by the court to the jury."

Appellant objects to this instruction on three grounds: First, because, it says, it directs a particular verdict in favor of the plaintiff upon the presupposed acts of negligence on the part of the appellant as therein set forth, and omitted and ignored the essential element of proximate cause. Second, because, it says, the instruction complained of omits the essential element of want of contributory negligence on the part of appellee, and directs a verdict upon the facts, or acts of appellant, without reference to appellant's care or want of care. Third, because, it says, it invades the province of the jury in assuming that the acts and omissions of appellant therein referred to constituted and were, under the circumstances, negligent.

This instruction is not open to the objections urged by counsel against it.

As to proximate cause, the language of said instruction, as it relates to that element, is as follows, after reciting the allegations of the complaint:

2. "and during all said length of time said defendant by the use of ordinary care could have known the same, and you further find that the breathing of said dust, gases and fumes that came from said mixture, as aforesaid, were injurious to the plaintiff, of which fact he had no knowledge, and of which fact the defendant could have known, by the use of ordinary care, or did know, and you further find that the plaintiff has been injured thereby in his general health, and as a result of the condition of his general health he has suffered cataracts of the eyes, then I instruct you that, if you find the facts stated in this instruction to be true, you will be entitled to find for the plaintiff."

While it is true that this instruction does not say in express terms that the jury must find that, *as a result of the condition of his general health, so produced as aforesaid*, he has suffered cataracts of the eyes, yet the instruction is so plain that the jury could not have been misled thereby.

As to the contributory negligence of the plaintiff, the jury were told that they must find, before they would be warranted in returning a verdict for

3. the plaintiff, that plaintiff had no knowledge that the breathing of the dust, gases and fumes that came from said mixture were injurious to him. The jury was required to find that plaintiff had no knowledge, and, if he had no knowledge, it is difficult to conceive how he could have been guilty of contributory negligence, causing his injury, as applied to the above instruction.

Next it is urged that this instruction is bad in that it assumes the appellant to have been negligent, under the circumstances, as to the acts and omissions complained of.

If the acts and omissions complained of, as stated in this instruction, were a matter of statutory

4. duty, then the failure of defendant to observe the statute and comply therewith was negligence *per se*.

It is alleged in the first paragraph of amended complaint, among other things, "that the dust and gases coming into the mixing room were poisonous; that the breathing of them was deleterious to health; that plaintiff while at his work under his employment, did breathe and inhale these gases and dust; that they injured his health; that he did not know that they were injurious to health at the time he was laboring

there and breathing and inhaling them; that the defendant did know they were injurious to the workmen, or by the exercise of ordinary care could have known that fact." All these facts, with others mentioned in said instruction, the jury were told they must find before returning a verdict for plaintiff.

Section 4, ch. 236, Acts 1911 p. 599, §3862d Burns 1914, provides: "It is hereby made the duty of all owners, \* \* \* corporations, agents or persons whatsoever, engaged in the care, operation, management, \* \* \* of any \* \* \* shop, factory or business of whatsoever kind, \* \* \* and, generally, it shall be the duty of all owners, managers, operators, contractors, \* \* \* and all other persons having charge of, or responsible for, any work, mechanism, machinery, appliance, building, factory, plants, means, employment, or business of whatsoever nature, involving risk or danger to employes, \* \* \* to use every device, care and precaution which it is practicable and possible to use for the protection and safety of life, limb and health, limited only by the necessity for preserving the reasonable efficiency of such structure, ways, work, plant, building, factory, \* \* \* appliances, apparatus, or other devices or materials, without regard to additional cost of suitable materials or safety appliances, or safe conditions, or operations, the first concern being safety to life, limb and health."

In view of this section of the statute, in considering the instruction under investigation, we ask, Did the appellant know that the continued breath-

5. ing of the dust and fumes, as complained of, was injurious to the workmen? If appellant did not so know, could it by the exercise of reasonable



care and caution in the premises have so known? If it did know of the poisonous nature, and deleterious effect of these gases and dust on workmen, and permitted their continued exposure thereto, it was negligent, as a matter of law, under the foregoing statute.

If it did not have actual knowledge of the foregoing facts, but by the exercise of reasonable care in the premises could have so known, and yet permitted the continuation of such dangerous condition, as to which condition the jury were told in said instruction that they must find as a fact, "That said partition was allowed by defendant to become in disrepair and was not properly constructed \* \* \* and that the doors and windows were left open so that dust \* \* \* was allowed to arise and blow through said crevices and cracks and said doors and windows in said partition, into and upon the workmen, and the plaintiff, at work in said blowing room," then, this fact being found against appellant, it was guilty of negligence in not so ascertaining that fact, and in permitting further unnecessary exposure of its employees thereto.

This instruction is not open to the objections urged against it.

The appellant also complains of the fourth instruction given. This instruction relates to the allegations found in the second paragraph of plain-

7. tiff's complaint, and is as follows: "No. 4. \* \* \* That the plaintiff, being required to work in said blowing room of the defendant's factory where said dust, fumes and gases were blown in upon him, inhaled the same, and as a result of said negligence of said defendant, as aforesaid, the plaintiff became weak and sickened, and his general health was

bad, and that while in said general run-down condition caused by the breathing of said gases and fumes and dust, so blown in upon him by the negligence of said defendant, the said plaintiff was required to and did work in a place where he was exposed to intense radiated heat upon his eyes and body, and that while in said condition of bad health, caused as aforesaid, the said intense radiated heat caused him to contract the disease of cataract of the eye, from which he suffered, *and that it was negligence upon the part of the defendant to allow and compel him to work in said place where his eyes were being subjected to said radiated heat while in said run down physical condition*, and that being compelled to work in said place where he was exposed to said radiated heat was liable to and would cause cataract of the eye; and that the said defendant was negligent in so compelling the said plaintiff to work at said place where he was exposed to said radiated heat while he was in such run-down condition in health as aforesaid. (Our italics.) \* \* \*

“The court instructs you that it is not necessary that the plaintiff shall prove each and every one of these acts of negligence on the part of the defendant. If he has proven any one or more of them that will be sufficient, so far as proving the acts of negligence on the part of the defendant is concerned; and if the plaintiff has so proven by a preponderance of the evidence any one of said acts of negligence, and you find that as a result of said negligent acts and as a proximate result thereof, the plaintiff has suffered ill health and finally was affected by having cataracts form on his eyes, and the plaintiff has proven the other material allegations and averments of his complaint by

a preponderance of the evidence, then he would be entitled to recover whatever damages you may find he has suffered by reason thereof.”

It will be noted that this paragraph of complaint, as set forth in said instruction, does not charge any knowledge on the part of defendant as to plaintiff's run-down condition in health. It is simply and broadly charged that defendant was guilty of negligence in causing plaintiff to work where he was exposed to this “intense radiated heat” at a time when plaintiff was in such run-down condition of health.

We know of no statute in this state prohibiting such request, or order, from employer to laborer in his employ, and yet the effect of this instruction is to make the giving of such order, under the circumstances as alleged in said paragraph of complaint, negligence *per se*. The question was one of fact for the determination of the jury, not the court, and, for this reason, this instruction was erroneous. *American Hominy Co. v. LaForge* (1916), 184 Ind. 600, 111 N. E. 8.

Appellant also complains of the fifth instruction, given by the court to the jury, because, it says, this instruction ignores the custom, which was shown by evidence, among glass-blowers, and in this occupation, which custom was that glass-blowers were customarily required, after their day's work, to assist in setting broken pots.

We hold that this instruction is not open to any of the objections urged against it.

The appellant also complains of instruction No. 7, given by the court to the jury. This instruction was directed to and covered the one proposition

8. only of plaintiff's predisposition to cataracts of the eyes, and told the jury “that, if they

should find from the evidence that plaintiff was so predisposed, yet, if they found that plaintiff had suffered the injuries complained of while working for the defendant, as hereinbefore set forth, then the fact that he was so predisposed to have cataract would not be a defense in this case.”

The expression, *as hereinbefore set forth*, has relation back to the foregoing instructions. It covers and relates to all of them. It covers and relates to the allegation of the plaintiff set forth in the second paragraph of his complaint, and also set forth in instruction No. 4, as given by the court concerning his being directed by defendant to work while in a “general run-down condition” of health, and was too broad. The jury could find, under this instruction, that, although the plaintiff was predisposed to have cataract of the eyes, yet, if he was required to do some certain work—gathering glass from the furnace—which was his regular work part of the time while employed by defendant, where his eyes and body would be exposed to intense radiated heat, which, with his “general run-down condition,” caused the cataracts to which he was predisposed to develop, yet, they might find for the plaintiff and against the defendant, and this, whether the defendant at that time had any knowledge of plaintiff’s “general run-down condition,” and predisposition to cataracts or not.

This instruction being predicated upon *other* instructions theretofore given, by reference, if any of the instructions upon which it is so predicated, by reference, is bad, that fact renders the instruction in question bad. We have already held that the fourth instruction given was erroneous, hence there was

error in giving the seventh instruction, above complained of.

Complaint is made of the ninth instruction given. This instruction, while not worded as accurately as it might have been, we think is a fair statement of the proposition of law involved therein, and not open to the objections urged against it.

The judgment in this case is reversed, and the trial court is directed to grant a new trial.

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SAPIRIE v. COLLINS ET AL.

[No. 9,803. Filed April 4, 1919. Rehearing denied June 18, 1919.]

1. **PLEADING.—Answer.—Argumentative Denial.**—In an action for conversion, an answer setting up a judgment awarding defendant possession of the property involved in an action brought by him against plaintiffs amounted to an argumentative denial, the substance of it being that there was no conversion. p. 530.
2. **CHATTEL MORTGAGES.—Nature.—Title and Possession.**—A chattel mortgage is at law a conditional sale which vests the legal title, and, *prima facie*, the right of possession to the thing mortgaged, in the mortgagee. p. 532.
3. **CHATTEL MORTGAGES.—Foreclosure.—Conversion by Mortgagee.**—Where, on foreclosure of a chattel mortgage, the mortgagee obtained a judgment awarding him possession of the property, and sold the same after giving the mortgagors ten days' notice as provided in the mortgage, the mortgagors, having no title to the property involved, nor the right to the possession of the same, cannot maintain an action for its conversion against the mortgagee, in the absence of proof by the mortgagors showing payment or other extinguishment of the mortgage, or anything more than the mere right to redeem. p. 536.
4. **TENDER.—Sufficiency.—Written Offer to Pay.**—Where chattel mortgagors wrote to mortgagee demanding a return of the mortgaged property, and in the letter stated, "With this demand we offer to pay" the amount of the debt, with interest, such offer cannot be construed as a tender. p. 537.

From Marion Superior Court (102,491); *James A. Bryant*, Special Judge.

Action by Samuel Collins and another against Moses Sapirie. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

*C. E. Fenstermacher*, for appellant.

*Joseph K. Brown, John Browder and Frank T. Hawley*, for appellees.

McMAHAN, J.—Complaint by appellees against the appellant for the conversion of certain personal property. The complaint alleged that the appellees were the owners of two horses, two mules, a wagon, and a set of harness, which had been in the possession of the appellees until some time in January, 1916, at which time the appellant took possession of said property under the terms of a chattel mortgage which appellees made in December, 1915; that after appellant took possession of said property he wrongfully and unlawfully converted it to his own use; that said mortgage was given to secure the payment of one note of \$278, due January 12, 1916; that a demand was made on appellant for the return of said property, and that the same was not complied with. The appel-

1. lant filed an answer setting up a judgment awarding him possession of the property in an action brought by him against the appellees, on account of the default of appellees. This amounted to an argumentative denial of the conversion alleged in the complaint, the substance of it being that there was no conversion. *Swope v. Paul* (1891), 4 Ind. App. 463, 31 N. E. 42. Cause was tried by the court and a judgment rendered against appellant in the sum of \$624.20. Appellant's motion for a new trial, for the reasons

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*Sapirle v. Collins*—70 Ind. App. 529.

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that the decision of the court is not sustained by sufficient evidence and is contrary to law, was overruled.

The only error assigned and not waived is that the court erred in overruling the motion for a new trial.

The appellant's contention is that there is no evidence of a conversion.

The facts are that on December 13, 1915, the appellees mortgaged to appellant the property mentioned in the complaint to secure the payment of two notes, one for \$278 due in thirty days, and one for \$150 due in six months. According to the terms of the mortgage, appellees were to retain possession of said property until the debt became due, or until default in some one of the conditions contained in the mortgage, when the appellant was authorized and empowered to take possession of the mortgaged property, and to sell the same at public auction upon first giving ten days' notice in writing to appellees. The first of said notes was not paid when due, and appellant commenced an action in the Marion Superior Court against the appellees for the possession of the property. On February 5, 1916, appellant obtained a judgment awarding him the possession of the mortgaged property.

Appellant gave appellees ten days' notice in writing that the property would be sold February 19, 1916. The sale was postponed until February 26, 1916, and all of said property was sold at public auction on said last-named day. It was knocked off to Nelson Wells for \$396, which was less than one-half of its value. It is not clear whether Mr. Wells, in bidding on the property, was acting for himself or as the agent of the appellant. All of said property was sold together, although there were parties present who wanted to buy the team of mules, and who so informed

the auctioneer and appellant's agents who were in charge of the sale, and requested that the mules be offered for sale by themselves. This request was refused after one Mr. Snyder offered to bid \$200 for the mules.

Within three or four days after said sale, appellees wrote a letter to appellant, making a demand for the return of said property. The appellees never made a tender to appellant of any amount in payment of the mortgaged debt or any part thereof. Said letter written to appellant contained the statement:

“With this demand we offer to pay the two hundred and seventy-eight (\$278) note, with interest at the rate of six (6%) per cent., which was due January 13th, 1916.”

The evidence also disclosed that after appellant took possession of said property he used the mules by working them on the streets, and received pay for such work.

The only question for our consideration is whether, under such a state of facts, appellees can maintain an action for conversion.

A chattel mortgage is at law a conditional sale, which vests the legal title and, *prima facie*, the right of possession to the thing mortgaged, in the  
2. mortgagee. *Lee v. Fox* (1888), 113 Ind. 98, 14 N. E. 889; *Broadhead v. McKay* (1874), 46 Ind. 595; *Johnson v. Simpson* (1881), 77 Ind. 412; *Roberts v. Norris* (1879), 67 Ind. 386.

The Supreme Court, in *Lee v. Fox*, *supra*, in discussing the rights of a mortgagor after default, said: “While it has been often broadly asserted that the title of the mortgagee becomes absolute after breach



of the conditions contained in the mortgage, it is nevertheless true, that, until the right or equity of redemption of the mortgagor has been foreclosed by some appropriate proceeding, the latter, having tendered performance of the conditions of the mortgage, may apply to a court of equity for permission to redeem; or if the property has been converted or disposed of in an irregular way, without his consent, the mortgagee may be compelled to account for its value, less the amount of his debt and interest. *Hackleman v. Goodman*, 75 Ind. 202; *Patchin v. Pierce*, 12 Wend. 61; *Denny v. Faulkner*, 22 Kan. 89; *Herman*, Chat. Mort. 461, 462. The right of the mortgagor to discharge the mortgaged property from the claim of the mortgagee, after condition broken, is abundantly settled. Unless the right to redeem has been waived, the mortgagor may assert his right at any time after forfeiture, and before the mortgage has been foreclosed, by paying or tendering the debt and interest, and redeeming the title. This right is called his equity of redemption, which may be barred or foreclosed in either of two ways, at the election of the mortgagee. It may be foreclosed by a decree in chancery, or by taking possession of the mortgaged property and selling it at public auction, in pursuance of legal notice to the mortgagor."

On page 104, the court said: "If for any reason a sale so made should turn out to be invalid, or if the mortgagee took possession of and claimed title to the property in pursuance of a sale collusively or improperly made to himself, the mortgagor could elect to treat the sale as valid, and hold the mortgagee to account for the excess produced over the mortgage debt, or he could disregard the sale and proceed for

the value of the property over and above the debt and interest.”

On page 105 of the same opinion, the court said: “A mortgagee of personal property does not hold the legal title to the mortgaged property in trust for the mortgagor. He holds it in his own right, and is in no sense a trustee, except as to the surplus which may remain after paying the mortgage debt.”

The Supreme Court, in *Picquet v. M'Kay* (1831), 2 Blackf. 465, laid down the rule that, in order to sustain an action for conversion, it is essential that the plaintiff prove title to the property and the right to possession, and a conversion by defendant.

It is the settled law of this state that “ ‘The mortgagee of personalty, the mortgage being silent as to possession, is immediately upon the execution of the mortgage entitled to the possession of the mortgaged property.’ \* \* \* It is equally well settled, that, if the mortgage contain an express or implied stipulation, that the mortgagor retain possession, he has the right to do so, until default is made in the condition of the mortgage.” *Johnson v. Simpson, supra*.

In *Carson v. Hanawalt* (1912), 50 Ind. App. 409, 90 N. E. 448, which was an action for conversion, the court said: “The essence of conversion is the wrongful deprivation of personal property to the owner. In actions of this character the rule in this State requires the claimant to have a right of property, either general or special, and possession, or the right of immediate possession at the time of the conversion. *Redman v. Gould* (1845), 7 Blackf. 361; *Swope v. Paul, supra*.”

In *Shellhouse v. Field* (1912), 49 Ind. App. 659, 97 N. E. 940, the court said: “In an action of this char-

acter, the complaint must allege that the plaintiff had, at the time of the alleged conversion, either a general or special ownership of the property converted. \* \* \* In an action to recover the value of personal property converted, the title thereto is always in issue."

The Supreme Court, in *Waters v. Delagrang* (1915), 183 Ind. 497, 109 N. E. 758, said: "In an action of this character the complaint must show by direct allegation or by necessary inference from facts well pleaded that, at the time of the alleged conversion, the plaintiff had either a general or special ownership of the property converted."

In *Day v. Watts* (1884), 92 Ind. 442, the court, in sustaining a demurrer to the complaint, said: "This proceeding constitutes what was formerly known as an action of trespass *de bonis asporatit*, and all the essential rules governing that form of action are applicable to this, the difference being in the form of procedure only. In all actions of the class to which this belongs it is necessary to aver, as well as to prove, ownership in the property wrongfully taken to entitle the plaintiff to recover. *Taylor v. Wells*, 2 Saund. 74 and notes; *Pinkney v. Inhabitants of East Hundred*, 2 Saund. 374, and notes. To sustain the averment of ownership it must be shown that the plaintiff was the absolute owner of the property, or that he had such an interest in it as constituted the taking an injury to him."

In *Easter v. Fleming* (1881), 78 Ind. 116, the jury had been instructed that the plaintiff could not recover unless he showed a right to the possession of the personal property at the time the action was commenced. The court, in holding this instruction good, said:

“The complaint is for the conversion of personal property, and it is an elementary doctrine that, in such cases, the plaintiff must show a right of possession in himself at the time he began his action.” Citing *Picquet v. M'Kay*, *supra*.

The Supreme Court of Wisconsin, in *Hill v. Merri- man* (1888), 72 Wis. 483, 40 N. W. 399, stated the rule as follows: “The mortgagee being \* \* \* entitled to the possession \* \* \* as against the mortgagor, the latter cannot, without proof of payment or other extinguishment of the mortgage, maintain an action of tort in the nature of trover for a conversion of the property. \* \* \* This is on the theory that such mortgage vests the legal title and right to the possession \* \* \* in the mortgagee, leaving the mortgagor with a mere equitable title; that is to say, a mere right in equity to redeem from the mortgage. It follows that such mortgagor must show something more than such mere right in equity to redeem, before he can maintain an action at law for the wrongful conversion against such mortgagee having such legal title and right to the possession.” See, also, *First Nat. Bank, etc. v. Wilbur* (1891), 16 Colo. 316, 26 Pac. 777; *Heyland v. Badger* (1868), 35 Cal. 404; *Landon v. Emmons* (1867), 97 Mass. 37; *Holmes v. Bell* (1849), 57 Mass. (3 Cush.) 322; *Brown v. Bement* (1811), 8 Johns. (N. Y.) 96.

Under the authorities cited, it is clear that the appellees did not have title to the property alleged to have been converted, nor did they have possession, nor the immediate right to the possession of the same, and hence were not in a position to maintain an action for conversion.

The offer which appellees made in their letter to

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pay the \$278 note cannot be construed as a tender.

The appellant was therefore rightfully in pos-

4. session of the property. The appellees might, upon making proper tender of the amount due, maintain an action in equity to redeem, or for an accounting.

The decision of the court is contrary to law, and it was error to overrule the motion for a new trial.

Judgment reversed, with directions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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LAKE MICHIGAN WATER COMPANY v. UNITED STATES  
FIDELITY AND GUARANTY COMPANY.

[No. 9,832. Filed June 18, 1919.]

1. PLEADING.—*Complaint.—Construction.—Variance.*—In an action on a contractor's bond, the bond and the contract, which includes the plans and specifications, must, in considering the complaint, be construed together, and, if any allegations of the complaint vary from the provisions of the contract, the latter will control. p. 541.
2. CONTRACTS.—*Construction Contracts.—Acceptance of Work by Architect.—Conclusiveness.*—Where a contract provides that work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator, and the parties are bound by his decisions in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment. p. 541.
3. CONTRACTS.—*Construction Contracts.—Decision of Arbitrator.—Conclusiveness.*—A provision in a building contract by which an architect or engineer becomes the arbitrator is more binding than an ordinary submission to arbitration, since it becomes a part of the consideration of the contract. p. 542.

From St. Joseph Superior Court; *Walter A. Funk*, Judge.

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Action by the Lake Michigan Water Company against the United States Fidelity and Guaranty Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Collins & Collins and Anderson, Parker, Crabill & Crumpacker*, for appellant.

*Kenefick & Kenefick and McInernys, Yeagley & McVicker*, for appellee.

REMY, J.—On June 9, 1908, the Lake Michigan Water Company, appellant herein, desiring to improve its water supply system at Michigan City, Indiana, entered into a contract with the M. H. McGovern Company, hereinafter called the contractor, to make such improvement. The United States Fidelity and Guaranty Company, appellee, became surety on said contractor's bond for the faithful performance of the contract. This action is by appellant on said bond. The contractor and said guaranty company were each made defendants, but process was never served upon the former. The complaint was in two paragraphs, to each of which appellee successfully demurred for want of sufficient facts. Appellant refused to plead further, and judgment was rendered that appellant take nothing, and that appellee recover costs. The appeal is from this judgment, and the only errors assigned are based on the rulings of the court on the demurrers to the two paragraphs of complaint. Appellant in its oral argument expressly waived the error, if any, as to the court's ruling on the demurrer to the second paragraph of complaint, and rested its case on the alleged error of the court in sustaining appellee's demurrer to the first paragraph.

The first paragraph of complaint, hereinafter de-

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nominated the "complaint," is in substance as follows: Appellant on June 9, 1908, entered into a written agreement with the M. H. McGovern Company, by the terms of which agreement said contractor was to furnish the materials and install in Lake Michigan a crib and intake pipe, in consideration of \$50,000 to be paid by appellant, for which amount the contractor was to, and did, give a bond to secure the faithful performance of said agreement, with appellee as surety, which bond is made the basis of the action. The written agreement of the contractor and the plans and specifications for the improvement are incorporated in the complaint, and provide that the contractor shall furnish all labor and material, and do all the work in accordance with said plans and specifications, which, as alleged, had been prepared by appellant's engineer. The plans and specifications, in substance, provide that all materials shall be furnished and labor performed to the satisfaction of said engineer, who was employed by appellant to design and supervise the construction of the work; that, in the event of discrepancy between the plans and specifications, the judgment of the engineer shall be final; that any doubt as to the meaning of the specifications shall be explained by the engineer; that, in the event of any leaks, the same shall be stopped to the satisfaction of the engineer; that any materials or work may be rejected by the engineer at any time before the final acceptance of the work; that the contractor is to afford the engineer proper assistance and facilities for the proper inspection of the work and materials; and that, "in case the rate of progress shall be in all respects satisfactory to appellant, monthly estimates will be made of the value of the work fully completed,

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constructed and in its proper place, and a voucher for eighty-five per cent. of the estimated value of the work so done during the previous month will be issued, the remaining fifteen per cent. to be reserved till the completion and acceptance of the whole work, at which time two-thirds of the said fifteen per cent. so reserved shall be paid to the contractor, and the remaining one-third retained for sixty days to insure the reconstruction by the contractor of defective work." It is further averred that the contractor negligently failed to perform the work in certain respects in accordance with the terms of the contract, and by reason thereof the intake pipe was rendered weak, leaky and unstable, and admitted sand and gravel into the pumps, whereby said intake pipe became wholly useless to the damage of plaintiff in the sum of \$50,000. It is further averred that the defects in the work complained of were latent, and of such a character that plaintiff did not discover and, in the exercise of reasonable care could not have discovered, until the time of the commencement of this action, which was approximately five years after the completion and acceptance of the work and the payment therefor. The usual clause in contracts of this character, providing for repair or maintenance for a definite period after the acceptance of the work, was omitted from the contract.

It is contended by appellee, and such was the holding of the trial court, that the complaint is demurrable for the reason that the facts pleaded show that appellant was bound at its peril so to inspect the work as it progressed that all improper material or defective work would be discovered and rejected before making final payment sixty days after the work



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was completed, and that, inasmuch as the work was accepted and payment therefor made, appellee was released as surety. On the other hand, appellant takes the position that, under the contract, it was not bound to discover the latent defects set forth in the complaint, which defects were not, and could not have been, discovered before settlement.

The bond sued on is an obligation to carry out the contract, and, in considering the complaint, the bond and the contract, which includes the plans and

1. specifications, must be construed together, and, if any allegations of the complaint vary from the provisions of the contract, the latter will control the pleading. *Harrison Bldg., etc., Co. v. Lackey* (1897), 149 Ind. 10, 48 N. E. 254; *Dunlap v. Eden* (1896), 15 Ind. App. 575, 44 N. E. 560. The contractor did not guarantee the materials furnished nor the efficiency of the work when completed. Its contract was to furnish materials and do the work according to certain plans and specifications prepared by appellant's engineer. All material was to be inspected, and all work to be supervised, by, and to the satisfaction of, such engineer. It is a well-

2. settled rule of law that, where a contract provides that work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator by the parties, and the parties are bound by his decisions in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment. *Cook v. Foley* (1907), 152 Fed. 41, 81 C. C. A. 237; *Barlow v. United States* (1900), 35 Ct. Cl. 514; *Williams v. Chicago, etc., R. Co.* (1892), 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403;

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*Church v. Shanklin* (1892), 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; *Martinsburg, etc., R. Co. v. March* (1885), 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Kennedy v. Poor* (1892), 151 Pa. 472, 25 Atl. 119; *Sheffield, etc., R. Co. v. Gordon* (1894), 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; *Moore v. Kerr* (1884), 65 Cal. 519, 4 Pac. 542. See, also, *Baltimore, etc., R. Co. v. Scholes* (1895), 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. 307; *McCoy v. Able* (1892), 131 Ind. 417, 30 N. E. 528, 31 N. E. 453. A provision in a

3. building contract by which an architect or engineer becomes the arbitrator is, if anything, more binding than an ordinary submission to arbitration, for the reason that it becomes a part of the consideration of the contract. *Williams v. Chicago, etc., R. Co., supra*. It has been held that, where the owner and building contractor have agreed that payments shall be made upon estimates furnished by the architect, such estimates have the force of findings between the parties, and are binding on them unless impeached for fraud. *Kilgore v. North West, etc., Soc. Baptist Educational Society* (1896), 89 Tex. 465, 35 S. W. 145.

It is very clear that the parties by their contract intended to place the engineer of the water company in charge of the work, and to make it his duty to supervise the construction, to the end that the improvement when completed should be in every particular in accordance with the plans and specifications. Appellee as surety on the bond had no voice in the acceptance or rejection of materials, but had a right to assume that the engineer would do his duty. The bond did not provide that the surety should be responsible for the conduct of the engineer in the exercise of the authority vested in him by virtue of

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the contract. The work was to be completed in the time specified, and, within sixty days after completion it was finally accepted, and payment was made therefor. If the work was not in all things as called for by the contract, the fault lay in the poor judgment or breach of duty on the part of the engineer selected by appellant, but who by the contract had become the arbitrator for both parties. It is not charged in the complaint that there was any fraud or mistake on the part of the engineer. The allegations of the complaint with reference to lack of knowledge on the part of appellant company add nothing to the pleading. Under the terms of the contract appellant's engineer was there as appellant's expert to know what was going on, and this expert of appellant was made the judge for both parties. We conclude that the trial court did not err in sustaining appellee's demurrer to the complaint. Judgment affirmed.

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FERGUSON, ADMINISTRATRIX, v. CLEVELAND, CINCINNATI,  
CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 9,758. Filed February 21, 1919. Rehearing denied May 9, 1919. Transfer denied June 18, 1919.]

1. RAILROADS.—*Injuries to Persons on Tracks.*—*Paragraphs of Complaint.*—*Theories.*—In an action against a railroad company for the death of one killed while walking along defendant's tracks, held that the theory of two paragraphs of complaint was the same. p. 548.
2. APPEAL.—*Review.*—*Harmless Error.*—*Ruling on Demurrer.*—Where a demurrer is sustained to one paragraph of complaint, and at the time there is another paragraph in the record under which the same facts are provable, and which is substantially upon the same theory, error in sustaining the demurrer is harm-

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less, and the subsequent dismissal of such other paragraph will not render the error, if any, in the ruling on the demurrer available. p. 548.

8. RAILROADS.—*Injuries to Persons on Tracks.—Liability.—Last Clear Chance.*—Where railroad employes in charge of a train discover the presence of a person on the tracks and his ignorance of his danger and peril in time to protect him by exercising ordinary care, it is their duty to do so under the last clear chance doctrine, regardless of whether he is a licensee or trespasser, and failing so to protect him the railroad company is liable. p. 549.

From Marion Circuit Court (25,937); *Louis B. Ewbank*, Judge.

Action by Olivia Ferguson, administratrix of the estate of James M. Ferguson, deceased, against the Cleveland, Cincinnati and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*George W. Galvin* and *Hottel & Patrick*, for appellant.

*Frank L. Littleton* and *Forrest Chenoweth*, for appellee.

NICHOLS, J.—This is a suit by Olivia Ferguson, administratrix of the estate of James N. Ferguson, deceased, for damages for the death of her husband.

The complaint was originally in two paragraphs. A demurrer was filed to each paragraph separately. The demurrer to the first paragraph was sustained. The demurrer to the second paragraph was overruled. This ruling was made on April 13, 1916. Thereafter, to wit, on April 24, 1916, the case was put at issue on the second paragraph of the complaint, by appellee filing an answer in general denial thereto. Thereafter, to wit, on May 17, 1916, appellant withdrew her second paragraph of complaint, and elected to

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stand on the ruling on demurrer to the first paragraph of complaint. Appellant declining to plead further, the trial court rendered judgment in favor of the appellee and against the appellant for costs. From this ruling and judgment of the court this appeal is taken. The error relied upon for reversal is that the court erred in sustaining the demurrer to the first paragraph of the complaint.

The first paragraph of the complaint appears in the appellant's brief. After averring appointment of the appellee as administratrix, and locating appellee's railroad, so much of this paragraph as is necessary for this decision is as follows: "That heretofore, to wit: On the 23rd day of January, 1913, this plaintiff's decedent was in the employ of the Indianapolis Gas Company and, as such employee went to his work and was suddenly taken seriously indisposed and left his work to return to his home. That in his sick and indisposed condition he walked upon and across the tracks of said defendant lying between his home and the said place of his work and followed the course that he had been accustomed to follow for a long period of time, with the full knowledge, acquiescence and consent of the said defendant and entered upon the tracks of said defendant at a point long used by divers and sundry persons, residents of the eastern portion of the city, in going to their homes and in passing to and from their work, the said defendant well knowing and being fully advised of the use of its tracks and the frequent and constant passage of persons over and along its said tracks in the eastern part of said city of Indianapolis, near a thoroughfare of said city known as Sherman Drive, and fully acquiescing in such use. That as plaintiff's decedent passed

along and across the tracks of said defendant in a sick, dazed and hesitating condition, he was seen by said defendant and his condition was apparent to said defendant. That the defendant was at the time moving and manipulating a locomotive engine and train of cars along and over its tracks so as aforesaid located, and at the time being walked upon by plaintiff's decedent, and saw said decedent while upon its tracks and in the way of the movement of the said engine and train, and knew, or, by the exercise of reasonable care, could have known, his sick and dazed condition; and knew, or, by the exercise of reasonable care, could have known, that said decedent was unaware of the approach of said locomotive engine and train of cars and was at the time oblivious of the danger and peril from the movement of said locomotive engine and train of cars in ample time to have warned plaintiff's decedent of the approach of said engine and train, or, in the exercise of ordinary care, to have stopped the same and thereby avoided injuring him; and the said defendant, seeing plaintiff's decedent in his perilous and dangerous position upon the track of said defendant and knowing, or having every reason to know, his lack of knowledge of the approach of said locomotive engine and train of cars and his ignorance of the peril or danger he was in long before it reached said decedent and while having sufficient time to warn said decedent of his danger, and sufficient time to have stopped and avoided injuring him after discovering his position and peril, negligently and carelessly ran said locomotive engine and train of cars against and upon plaintiff's decedent and instantly killed him."

The second paragraph of complaint appears in appellee's brief. After introductory averments as in

the first paragraph so much of the second paragraph as is necessary for this decision is as follows: "That within the corporate limits of said city of Indianapolis and along and near the two main tracks of defendant are erected and maintained by patrons of said defendant immense elevators, extensive manufactories and large business enterprises which are approached and entered by switches from said main tracks, and such switches are in constant use by employees of such business and persons having business therewith in passing to and from such establishments, and who had no other or different way of approaching or entering such establishments, all of which was well known to defendant, and such switches were constructed by defendant and its business patrons for such, among other uses, and were so used with its full knowledge and consent and for their joint interest and benefit. That heretofore, to wit, on the 23rd day of January, 1913, this plaintiff's decedent was called upon, in business relations with one of the large enterprises so located along and near to defendant's main tracks, in the southeastern part of said city, having such switch tracks as aforesaid, and having entered the same and concluded his business, sought to leave such premises along and upon a switch track from said main track approaching and entering said business premises, and while upon said switch track and in the customary and lawful use of the same, the said defendant propelled one of its locomotive engines and train of cars along its main track and suddenly and without warning or notice of its intention so to do, negligently and carelessly switched its locomotive engine and train of cars from said main track into and upon said switch track so being used by decedent,

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who was in entire ignorance of any peril or danger, and with full knowledge of decedent's presence and peril, negligently and carelessly ran its locomotive engine and train of cars against, upon and over said decedent, instantly killing him."

We have carefully examined these paragraphs of complaint, and we can find no substantial difference in their theories. The facts provable under the

1. first paragraph could have been as readily proved under the second paragraph. It is well established in this state that, where a demurrer
2. is sustained to one paragraph of complaint, and at the time there is another paragraph in the record, under which the same facts are provable, and which is substantially upon the same theory, error in sustaining such demurrer is harmless; and if such paragraph is afterward dismissed by the plaintiff, this act will not render such error, if any, available. *Sanders v. Crawford* (1908), 41 Ind. App. 245, 83 N. E. 719; *Cleveland, etc., R. Co. v. Hollowell* (1909), 172 Ind. 466, 88 N. E. 680; *Chicago, etc., R. Co. v. Indiana Nat. Gas, etc., Co.* (1903), 161 Ind. 445, 68 N. E. 1008; *Whiteman v. Harriman* (1882), 85 Ind. 49; *City of Elkhart v. Wickwire* (1882), 87 Ind. 77; *Luntz v. Greve* (1885), 102 Ind. 173, 26 N. E. 128; *Field v. Noblett* (1900), 154 Ind. 357, 56 N. E. 841; *Lester v. Brier* (1882), 88 Ind. 296.

We find no available error in the record. Judgment affirmed.

#### ON PETITION FOR REHEARING.

NICHOLS, J.—The appellant contends that, although the second paragraph of the complaint contains



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“some allegations bordering on the doctrine  
3. of last clear chance, it does not allege facts to  
show that the appellee knew of decedent’s  
presence on the track in time to have avoided the in-  
jury and hence cannot be fairly said to be drawn on  
that theory, in other words, the theory of this para-  
graph is that decedent was rightfully on the track  
under an implied license and that his death resulted  
from the original negligence chargeable to the appel-  
lee.” We are wholly unable to harmonize this state-  
ment with the following averment quoted from the  
plaintiff’s second paragraph of complaint, speaking  
of appellant’s decedent: “While upon said switch  
track and in the customary and lawful use of the same,  
the said defendant propelled one of its locomotive  
engines and train of cars along said track and sud-  
denly and without any warning or notice of its inten-  
tion so to do negligently and carelessly switched its  
locomotive engine and said train of cars from the  
main track to said switch track so being used by de-  
cedent, *who was in entire ignorance of any peril or  
danger, with full knowledge of decedent’s presence  
and peril caused solely by the movements of said loco-  
motive and train of cars and with full knowledge of  
his ignorance of danger and peril,* negligently and  
carelessly ran its said locomotive engine and train of  
cars against, upon and over said decedent, instantly  
killing him.” With these averments, it can make no  
difference whether the appellant’s decedent was upon  
the appellee’s tracks under an implied license based  
upon one state of facts or upon some other state of  
facts, or whether he was there as a trespasser, for,  
under the doctrine of last clear chance, the appellee  
could not escape its liability even though the decedent

was a trespasser, where, before the commission of its negligent act, the presence of the decedent and his ignorance of his peril and danger were known to the appellee in time to have avoided his injury by the use of ordinary care. 29 Cyc 443; *Chicago, etc., R. Co. v. Pritchard* (1907), 168 Ind. 398, 414, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857. This being the law, the facts necessary to a recovery would not have made it incumbent upon the appellant to show that her decedent was rightfully upon the appellee's tracks, under an implied license based upon either the state of facts set up in the first paragraph of the complaint, or upon the state of facts set up in the second paragraph of complaint; for if the appellee discovered the presence of appellant's decedent and his ignorance of his danger and peril in time to have protected him, it was its duty so to do as the one having the last clear chance, regardless of whether he was a licensee for any reason, or a trespasser, and failing so to protect him, it would have been liable in damages.

The petition for rehearing is overruled.

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CASSIDY v. WARD ET AL.

[No. 9,902. Filed June 20, 1919.]

1. **APPEAL.—Briefs.—Questions Presented.**—Any question with reference to the action of the trial court in overruling the motion to modify the judgment is waived by appellant's failure to set out the motion or the substance thereof, and by failure to state any specific point thereon, as required by the rules governing the preparation of briefs. p. 553.
2. **APPEAL.—Review.—Judgment.—Weight and Sufficiency of Evidence.**—The decision of the trial court must be sustained, if it

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- is supported in its material aspects by any competent evidence, although there may be other evidence from which a different conclusion might have been reached. p. 553.
3. EVIDENCE.—*Date of Execution of Mortgage.*—The date of a deed or mortgage only furnishes *prima facie* evidence of the date of its execution, which may be rebutted. p. 555.
4. DEEDS.—*Mortgages.—Date of Taking Effect.*—Deeds and mortgages become effective from the time of their execution, which includes their delivery to, and acceptance by, the grantee or mortgagee. p. 555.
5. VENDOR AND PURCHASER.—*Vendor's Lien.—Waiver.—Acceptance of Mortgage.*—Generally, where the vendor of land takes a mortgage to secure the unpaid purchase price, he thereby waives the implied equitable lien which he would otherwise have as security for its payment. p. 557.
6. APPEAL.—*Review.—Scope.—Issues Not Raised by Pleadings.*—Where, in an action to foreclose a mortgage on land, plaintiff appellant did not allege that she had a vendor's lien on the land involved, and cross-complainant did not present any such issue, but alleged that his mortgage was senior to that of plaintiff, thereby raising only the question of the priority between the two mortgages, appellant's contention that she had a vendor's lien was outside the issues presented and determined in the trial court and cannot be considered on appeal. p. 558.

From Perry Circuit Court; *William Ridley*, Judge.

Action by Leona M. Cassidy against John F. Ward and wife, in which Adolph Graves filed a cross-complaint against plaintiff and defendants. From the judgment rendered, the plaintiff appeals. *Affirmed.*

*Leo H. Fisher, John W. Ewing and Edmund S. Lincoln*, for appellant.

*Oscar C. Minor*, for appellee.

BATMAN, C. J.—Appellant brought this action against appellees John F. Ward and Marguerite Ward, husband and wife, on two promissory notes of \$750 each, executed by said John F. Ward, and secured by a mortgage on certain real estate in Perry county, Indiana. The complaint is in a single

paragraph of the usual form, with the following additional averment: That said mortgage "was represented to be a first mortgage, and was to be dated the same day hereof as said notes, but the date was made on the 30th day of August, 1910, when said date should have been the 27th day of August, 1910, and said date was changed by mistake." Appellees Ward and Ward answered said complaint by a general denial. Appellee Adolph Graves was admitted as a party defendant on his own application, and answered appellant's complaint by a general denial. He also filed a cross-complaint against appellant and his coappellees, by which he sought to recover a judgment against his coappellees, Ward and Ward, on a promissory note for \$1,500, and to foreclose a mortgage on the same real estate described in plaintiff's complaint, alleged to have been given to secure said note. Said cross-complaint alleges that the mortgage described therein was senior to appellant's said mortgage, and asked that it be so decreed. Appellant answered said cross-complaint by a general denial. Trial was had by the court, resulting in judgments against appellees Ward and Ward, in favor of appellant and appellee Graves, on their respective notes, the foreclosure of their respective mortgages, and an order for the sale of the real estate in satisfaction of said judgments, the mortgage of appellee Graves being decreed to be superior to the mortgage of appellant. Appellant filed a motion to modify the judgment, and also filed a motion for a new trial, both of which were overruled, and has assigned the action of the court in overruling her said motions as the errors on which she relies for reversal.

Any question with reference to the action of the

court in overruling the motion to modify the judgment has been waived by appellant, by failing

1. to set out said motion, or the substance thereof, in her brief, and by failing to state any specific point thereon, as required by the rules governing the preparation of briefs. *M. Rumley Co. v. Major* (1917), 64 Ind. App. 41, 115 N. E. 337; *Robbins v. Bank, etc.* (1917), 186 Ind. 573, 117 N. E. 562; *Clifton v. McMains* (1916), 184 Ind. 539, 111 N. E. 801.

The sole question presented by this appeal relates to the priority of the liens held by appellant and appellee Graves on the real estate described by

2. virtue of their respective mortgages. In considering this question, it should be borne in mind that, under the rules governing appeals, the decision of the trial court must be sustained, if it is supported in its material aspects by any competent evidence, although there may be other evidence from which a different conclusion might have been reached. *Public Utilities Co. v. Handorf* (1916), 185 Ind. 254, 112 N. E. 775; *Elliot v. Elliot* (1916), 61 Ind. App. 209, 111 N. E. 813; *Toledo, etc., R. Co. v. Milner* (1916), 62 Ind. App. 208, 110 N. E. 756; *Caldwell v. Ulsh* (1916), 184 Ind. 725, 112 N. E. 518, Ann. Cas. 1918E 68; *Trout v. Woodward* (1917), 64 Ind. App. 333, 114 N. E. 467.

The evidence is contradictory in some particulars, and in others not entirely clear, but there is competent evidence which reasonably tends to establish the following facts: That appellant sold the real estate in question to appellee John F. Ward in August, 1910, for \$3,000, one-half of which was to be paid in cash, and the remainder to be evidenced by notes, secured by a mortgage thereon; that, for the purpose

of securing the money with which to make said cash payment, said Ward called on appellee Graves and arranged for a loan of \$1,500, and agreed to give him a mortgage on the land in question to secure the same; that on August 27, 1910, in pursuance of said arrangement, Graves gave Ward a check for said sum, and later on said day Ward, in company with a notary public, called upon appellant at her home for the purpose of consummating the purchase of said real estate; that, while there, appellant, who was a widow, signed, acknowledged and delivered to Ward a deed therefor, and Ward gave to her, as the cash payment agreed upon, the check for \$1,500, which he had obtained from Graves for that purpose, and also delivered to her the two notes in suit of \$750 each, bearing date of August 27, 1910, to evidence the balance due her for said real estate; that, on the same occasion, the notary public prepared, and Ward signed, a mortgage on the real estate in question to secure said two notes, being the mortgage described in appellant's complaint; that, as the wife of said Ward was not present to sign and acknowledge the mortgage, it was not delivered to appellant at that time, but was taken away for the purpose of obtaining the signature of Ward's wife thereto; that later, on the same day, Ward and the notary public went to the place of business of appellee Graves with the note and mortgage described in the cross-complaint duly prepared, where Ward completed their execution by delivering the same to Graves, by whom they were then accepted; that said note and mortgage each bore the date of August 27, 1910, and, at the time Graves accepted the same, he knew that one-half of the purchase money for said real estate had not been paid; that subse-

quently on August 30, 1910, the mortgage described in appellant's complaint, having been given the date last named, and having been duly signed and acknowledged by Ward and his wife, was delivered to appellant, who accepted the same as security for the two \$750 notes, which Ward had theretofore delivered to her on August 27, 1910, to evidence the balance of the purchase price of said land; that the said mortgage of appellee Graves was duly recorded in the office of the recorder of Perry county, Indiana, on August 30, 1910, and the said mortgage of appellant was so recorded on September 2, 1910.

It will be observed that appellant has alleged in her complaint that her mortgage should have been dated August 27, 1910, and that it bore the

3. date of August 30, 1910, by mistake. The fact that such a mistake was made, if it be a fact, did not affect appellant's rights, as the date of a deed or mortgage only furnishes *prima facie* evidence of the date of its execution, which may be rebutted. *Guyer v. Union Trust Co.* (1914), 55 Ind. App. 472, 104 N. E. 82. In this case the evidence, outside of the dates which the mortgages in question bear, tends strongly to show that the mortgage of appellee Graves was delivered to, and accepted by, him, prior to the day on which appellant's mortgage was delivered to her.

4. It is well settled that instruments, such as deeds and mortgages, become effective from the time of their execution, which includes their delivery to, and acceptance by, the grantee or mortgagee. *Hoadley v. Hadley* (1874), 48 Ind. 452; *Krutsinger v. Brown* (1880), 72 Ind. 466; *Sims v. Smith* (1885), 99 Ind. 469, 50 Am. Rep. 99; *John Shillito Co. v. McConnell* (1891), 130 Ind. 41, 26 N. E. 832; *Mc-*

*Colley v. Binkley* (1919), 69 Ind. App. 352, 121 N. E. 847. Applying this well-settled rule to the facts which the evidence in this case tends to establish, as stated above, it is clear that the mortgage of appellee Graves was executed and became effective prior to that of appellant.

But appellant contends that, although the mortgage of appellee Graves may have been executed and became effective prior to her mortgage, nevertheless, it should not have been decreed to be senior thereto. In support of this, she calls our attention to the fact that all of the notes in suit are dated August 27, 1910; that her notes mature five years after date, while the note of appellee Graves does not mature until six years after date, and cites certain decisions of this state which hold that a mortgage given to secure the payment of several notes, payable at different times, must be considered as if there were as many different successive mortgages as there are notes, and the holder of the note first maturing will be considered as having priority, and the holder or holders of the remaining notes will come in in the same order in which said notes mature. It must be apparent, however, that this rule can have no application to a case like the one at bar, where the several notes involved are secured by different mortgages, executed on different dates.

Appellant also cites the doctrine of instantaneous seizin, which has been applied for the purpose of preserving the priority of a purchase-money mortgage, executed at the time the vendor parts with his title to the real estate covered thereby, as against a mortgage thereon executed by the vendee prior thereto. Again it must be apparent that this doctrine can have



no application under the facts of this case, as the uncontradicted evidence shows that appellant's mortgage on the real estate in question was not *executed* at the time she delivered her deed to said real estate to appellee John F. Ward.

It is further contended by appellant that she had a vendor's lien on the real estate in question, as security for her two notes of \$750 each; that her

5. acceptance of a mortgage on the real estate to secure the same did not constitute a waiver of her said vendor's lien; and that, by reason of that fact, the court erred in its decree with reference to the priority of the mortgage in suit. As pertinent to this question, it should be noted that, as a general rule, where the vendor of land takes a mortgage thereon to secure the unpaid purchase price therefor, or a part thereof, he thereby waives the implied equitable lien, which he would otherwise have as security for its payment. *Harris v. Harlan* (1860), 14 Ind. 439; *Mattix v. Weand* (1862), 19 Ind. 151; *Wilson v. Hunter* (1868), 30 Ind. 466; *Fouch v. Wilson* (1877), 60 Ind. 64, 28 Am. Rep. 651; *Anderson v. Donnell* (1879), 66 Ind. 150; *Richards, Gdn., v. McPherson* (1881), 74 Ind. 158; *Robbins v. Masteller* (1897), 147 Ind. 122, 46 N. E. 330. As said by the court in the case first above cited, on page 440: "By taking a mortgage to secure the unpaid purchase money, the vendor waived the implied equitable lien which he otherwise might have had for the payment thereof, and created an express lien. Although the implied and express liens are both intended to effect the same purpose, and both on the same property, yet they are, in their nature, so different, that they cannot both exist as to the same object, at the same time,

and for the same purpose, because they are inconsistent. One is a mere equity based upon the idea that the vendee holds the legal estate in trust for the payment of the vendor. The other puts the legal title in the vendor, and makes him the trustee—destroys, or at least merges, the implied lien, by creating the express lien, and throwing the trust on the vendor, the mortgagee.”

It has also been beld that, when a vendor's lien has once been waived, it cannot be revived. *Mattix v. Weand, supra*; *Richards, Gdn., v. McPherson, supra*; *Nutter v. Fouch* (1882), 86 Ind. 451; *Buffalo, etc., Quarries Co. v. Davis* (1910), 45 Ind. App. 116, 90 N. E. 327.

Appellant has cited a number of cases in this state which she insists conflict with the rule first above stated on the question of waiver, but an exami-

6. nation of these cases discloses that any apparent conflict may be readily explained from the particular facts and circumstances involved. But it is unnecessary to resort to this rule in order to sustain the decision of the trial court, as, under the issues in this case, no question can properly arise as to the priority between the mortgage of appellee Graves and an implied equitable lien for the unpaid purchase money in favor of appellant. An examination of the complaint discloses that she does not allege that she has a vendor's lien on the real estate, and ask that it be enforced. Appellee Graves by his cross-complaint does not present any such issue, but alleges that his mortgage is senior to the mortgage of appellant, which is met with an answer of general denial. Thus an issue of priority between the two mortgages was clearly made, and, as no other issue of priority was

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tendered, the correctness of the court's ruling must be determined in the light of such issue, and not in the light of an issue that might have been tendered. Under this state of the record, we are forced to conclude that appellant's contention with reference to the existence of a vendor's lien in her favor is outside of the issues presented and determined in the trial court. *Hull v. Mechanics Building, etc., Assn.* (1914), 56 Ind. App. 449, 105 N. E. 573.

Appellant has also discussed the rule involving the question of presumption of payment arising from the acceptance of a note governed by the law merchant, and also a rule involving the merger of legal and equitable liens, but, as these rules can have no controlling influence on the sole question presented for our determination on this appeal, their consideration is unnecessary. For the reasons stated, we conclude that the court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

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EARLE ET AL. v. FLETCHER AMERICAN NATIONAL BANK.

[No. 9,889. Filed June 20, 1919.]

1. **BILLS AND NOTES.—Accommodation Paper.—Holders Without Notice.**—One who has received accommodation paper, even after it has been diverted from its contemplated purpose, without notice of the diversion, in good faith and for value, is entitled to recover thereon. p. 567.
2. **BILLS AND NOTES.—Discharge of Surety.**—In order that a surety, as such, may be discharged by the acts of the creditor or obligee, the latter must have knowledge of the existence of the relation. p. 567.

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3. **BILLS AND NOTES.—Accommodation Paper.—Maker's Liability.**—Where one takes accommodation paper without knowledge of its true character, the accommodation party is bound by his apparent standing on the face of the instrument and cannot claim the privilege of a surety of the real debtor. p. 567.
4. **BILLS AND NOTES.—Principal and Surety.—Notice of Relation.—Unindorsed Noncommercial Paper.**—The fact that a note given as collateral to secure the payment of a loan is noncommercial paper, and is unindorsed, does not charge the creditor with knowledge that the maker is merely surety. p. 568.
5. **ESTOPPEL.—Accommodation Paper.—Innocent Holders.—Right of Recovery.**—Where a mother invested her son with apparent ownership of a noncommercial note and mortgage, which in fact was accommodation paper, and the son, by depositing such paper as collateral security, obtained not only the loan contemplated by the maker of the accommodation paper, but also several renewals thereof, the lender, being without notice, could recover on the collateral on the son's failure to make repayment, since, where one of two innocent persons must suffer by the act of a third, he who put it in the power of the third to do the act must suffer. p. 568.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by the Fletcher American National Bank against Effie S. Earle and another. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

*A. D. Bartholomew, John H. Gillett* and *Gerald A. Gillett*, for appellants.

*R. R. Peddicord, E. D. Crumpacker, Grant Crumpacker* and *Owen L. Crumpacker*, for appellee.

NICHOLS, P. J.—This suit was upon a note executed by appellant John H. Earle, and upon a note and mortgage executed by appellant Effie S. Earle to her coappellant, and claimed by the appellee to be collateral security for the payment of the first-mentioned note. Hereinafter, appellant Effie S. Earle will be mentioned as appellant.

Appellee's amended complaint was in one para-

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graph, with appellant and said John H. Earle as defendants therein. In substance, it was as follows: On the — day of —, 1914, said John H. Earle borrowed of appellee \$2,000, executing his note therefor, payable three months after date. At that time he held and owned a note for \$2,000, secured by a mortgage on certain real estate, which note and mortgage were executed by appellant, and which he assigned as collateral security to appellee to secure said loan, which said note so assigned is due and wholly unpaid. When the note executed by said John H. Earle became due on January 23, 1915, he renewed it to April 15, 1915, by executing a new note due at said last-named date, which note was not given in payment. To secure its payment he left with appellee the said note and mortgage of appellant. Said renewal note is due and wholly unpaid. Said collateral note and mortgage were assigned by said John H. Earle to appellee by written assignment. A reasonable attorney's fee for the collection of the note of said John H. Earle is \$250.

The said collateral note is noncommercial paper. The assignment thereof is in writing, in which it is provided that the same is as collateral security, and that it is "to include any and all renewals of promissory notes or new promissory notes or other obligations accepted in payment of former obligations." John H. Earle suffered default. Appellant filed an answer to the amended complaint in five paragraphs. The first was a general denial. The second admitted the execution of the note and mortgage, but averred that they were executed to secure the payment of a note executed by said John H. Earle to appellant, dated September 25, 1914, for a loan to him of \$2,000,

and due ninety days after date, and for no other or different purpose, which appellee well knew, and that said note was taken up at maturity. The third paragraph was a plea of no consideration. The fourth paragraph admitted the execution of said note and mortgage, but avers that they were executed for the sole purpose and upon the sole condition that the payee might use the same as collateral for a loan to him from appellee of \$2,000, to be evidenced by a note therefor, payable in ninety days after its execution. That pursuant thereto the said John H. Earle borrowed said \$2,000 from appellee, executing his note therefor, payable in ninety days after its execution, drawing eight per cent. interest from maturity, said note being the first-mentioned note in plaintiff's complaint, and with which he deposited appellant's note and mortgage as collateral security, but without any indorsement, and that the same are not transferred or in any manner assigned by said John H. Earle to appellee, and that they were held by appellee as a bare deposit of papers in the original form without any writing, collateral or otherwise, transferring either of them to appellee. When said first-mentioned note fell due, to wit, on December 24, 1914, said John H. and appellee entered into an agreement surrendering said note, and in consideration of such surrender said John H. executed a new note, in lieu of the former, due January 23, 1915, and appellee extended the time of payment to said January 23, 1915, and accepted interest to said date from said John H. On January 23, 1915, by agreement, said note then maturing was surrendered, and in consideration of such surrender said John H. executed a new note in lieu thereof due April 15, 1915, and paid the interest

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thereon to said date. Said last-mentioned note against said John H. is the note sued on in appellee's complaint. Appellant executed to said John H. the said note and mortgage as surety only for the first of said notes, and that said note and mortgage were wholly without a consideration, saving only as they were given as an accommodation to enable said John H. to obtain the first of said loans, as evidenced by said ninety-day note. Appellant had no notice or knowledge of either of said agreements between appellee and said John H. for the extension of the time of payment or anything pertaining thereto, and has never given her consent to anything that was so agreed to be done between appellant and said John H., and did not know or consent that her said note or mortgage should be held as security for other than the said first note, if so they were, and that said extensions were wholly without appellant's consent, and appellee at all times knew she was the surety only. This paragraph of answer was verified.

The fifth paragraph was the same as the fourth, except that it charged that each of the notes of December 24, 1914, and January 23, 1915, were executed in payment of the note immediately preceding. Appellee replied in two paragraphs, the first being general denial, and the second being addressed to the fourth paragraph of answer, and averring that said John H. applied to appellee for a loan of \$2,000 on September 25, 1914, and stated that he expected to have a note for \$2,000 secured by mortgage on real estate described in the complaint given him by appellant, and that, if appellee would loan him \$2,000, he would deposit, assign and turn over to appellee said note and mortgage. Appellee agreed to make such loan if

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such note and mortgage were so turned over. Thereupon John H. executed said note, which was held until the note and mortgage involved were assigned and delivered to the appellee as collateral security for the payment of said note; and that it made said loan depending on said security. John H. represented to appellee that he was the owner of said note and mortgage, and that appellee had no notice or knowledge that they were accommodation paper. That, at the maturity of the first note, said renewal notes were executed with the understanding that said note and mortgage should remain as collateral security therefor. Appellee had no notice or knowledge that said note and mortgage were not the property of John H., and acted in good faith, and in the honest belief that they were his property in making said original loan and the extension, and appellee never heard of the claim that said collateral note and mortgage were accommodation paper until after the commencement of this suit.

There was a trial by the court, which resulted in a general finding and judgment for the appellee against said John H. on his note for \$2,499.98, and costs, and the finding and decree in appellee's favor against appellant on her note and mortgage in the sum of \$2,410.50, and for the foreclosure of said mortgage and for costs.

It was further found and adjudged that said note and mortgage were collateral for said note of John H. Appellant filed her motion to modify the judgment, which was overruled. She then filed her motion for new trial, which was overruled, and she now prosecutes this appeal.

Appellant assigns as error the action of the court



in overruling her motion to modify the judgment, and in overruling her motion for a new trial. In her motion for new trial the appellant has specified: (1) That the decision of the court is not sustained by sufficient evidence. (2) That the decision of the court is contrary to law.

It appears by the evidence in this case that John H. Earle, who was the son of the appellant, applied to the appellee on September 25, 1914, for a ninety-day loan of \$2,000, representing at said time that he owned an interest in an unsettled estate, and which he expected to sell to his mother, the appellant. That he expected to obtain therefor a note secured by mortgage on appellant's real estate in lieu of the money for the purchase of such interest. Appellee agreed to furnish him the loan applied for upon condition that he procure, and pledge as collateral security for the loan, the note and mortgage to be obtained from his mother as his own property. Thereupon he executed the note first mentioned in the complaint, and a written pledge, which were left in the custody of the appellee, and the money for the loan was to be placed to his order when he delivered the said note and mortgage to the appellee as collateral security for the payment of the loan.

In a few days said John H. returned with the note and mortgage involved, duly executed, which he delivered as collateral security to the appellee, stating that the note and mortgage were his absolute individual property. Thereupon the amount of the loan, less interest discounted, was placed to said John H.'s credit, and soon thereafter withdrawn from the bank. There was no restriction of any kind or nature in the collateral paper, and nothing to indicate that it was

executed as accommodation paper, and on its face appeared to be the result of a business transaction for a valuable consideration. The evidence shows that the appellee in good faith believed the collateral paper to be John H.'s individual property, and, acting on such belief, made the loan aforesaid. The evidence shows that appellee had no knowledge or intimation from any source that such collateral was accommodation paper until after the institution of the suit thereon. John H. being unable to pay his loan at maturity, the same was twice extended, renewal notes being executed at each extension. At the time of said extensions the said collateral note and mortgage had not reached their maturity.

Appellant contends that she occupied the relation of a surety to John H., and that, as her note and mortgage were executed for the purpose only of obtaining the loan evidenced by the first note mentioned in the complaint, the taking of the renewal notes without her knowledge and consent discharged her; that, it having been understood between herself and John H. that her note and mortgage were only pledged for the payment of the first note, therefore they were not pledged for the payment of either of the renewal notes; that the appellant upon no consideration, except as the maker of accommodation paper, became a surety as to her note and mortgage, and secured the payment of only the first note mentioned in the complaint, and that, such note being nonnegotiable by the law merchant, the appellee was charged with implied knowledge of her relationship, and, with such implied knowledge having twice definitely extended the time of the payment of the principal owed, she was thereby discharged. She cites

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in support of her position the following Indiana cases: *Matchett v. Winona, etc., School Assn.* (1916), 185 Ind. 128, 113 N. E. 1; *Buck v. Smiley* (1878), 64 Ind. 431; *White v. Whitney* (1875), 51 Ind. 124; *Jarvis v. Hyatt* (1873), 43 Ind. 163; *Dickerson v. Board, etc.* (1885), 6 Ind. 128, 63 Am. Dec. 373; *Altoona, etc., Bank v. Dunn* (1892), 151 Pa. St. 228, 25 Atl. 80, 31 Am. St. 742. In each of these cases, however, except one, it appears that the payee at the time of the extension complained of had knowledge of the relation of suretyship. The case of *Jarvis v. Hyatt, supra*, is the exception, in which the matter of knowledge, or want of knowledge, is not mentioned.

Appellant cites 1 Am. and Eng. Ency. Law, pages 382, 383, from page 383 of which volume we quote:

“One who has received accommodation paper 1-3. even after it has been diverted from its contemplated purpose, without notice of the diversion, in good faith and for value, is entitled to recover thereon.” She also cites 32 Cyc, from page 158, of which volume we quote: “In order that a surety, as such, may be discharged by acts of the creditor or obligee, the latter must have knowledge of the existence of the relation.” She also cites 8 C. J., from page 274 of which volume we quote: “There is no question that, as to persons who take accommodation paper without knowledge of its true character, the accommodation party is bound by his apparent standing on the face of the instrument and cannot claim the privileges of a surety of the real debtor.” With these statements of the rule of law before us, quoted from volumes cited by appellant, we do not deem it necessary further to review the long list of authorities cited by her.

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Appellant contends that, because of the fact that the note involved is noncommercial paper, and because it was unindorsed, appellee was charged

4. with knowledge of appellant's suretyship. This does not seem to be the rule of law with notes under circumstances similar to the one in this suit. In the case of *Tharp v. Parker* (1882), 86 Ind. 102, the note in suit was noncommercial paper, and it was held in that case that, the suretyship not being apparent on the face of the note, the surety was not released by an extension of the time of payment, unless the payee had knowledge of the suretyship. In *Mulledore v. Wertz* (1881), 75 Ind. 431, 39 Am. Rep. 155, the note involved was noncommercial, and it was held that an agreement between the payee and one of the joint makers, without the knowledge or consent of the other, a surety in fact but not known as such to the payee, does not release the nonconsenting maker. In *Gipson v. Ogden* (1885), 100 Ind. 20, 25, which involved the collection of a judgment, it was held that a surety is not released by the extension of time, unless the creditor had notice of the relationship, and that this rule applies where the assignee of the payee takes without notice that one of the makers is surety. Other authorities to the same effect are: *Williams v. Scott* (1882), 83 Ind. 405, 407; *Lamson v. First Nat. Bank* (1882), 82 Ind. 21, 23; *Weaver v. Prebster* (1906), 37 Ind. App. 582, 77 N. E. 674.

Other questions are discussed in the briefs filed, both of which are ably prepared, but we do not deem it necessary to discuss them for the purposes

5. of this opinion. A loss must be sustained, and the appellant having invested her son with apparent ownership of business paper, and thereby hav-

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ing enabled him to obtain the money from appellee, she must bear the loss. It is a familiar principle of law that, where one of two innocent persons must suffer by the act of a third, he who put it in the power of the third to do the act must suffer. *Hirsch v. Norton* (1888), 115 Ind. 341, 17 N. E. 612.

The judgment is affirmed.

McMahan, J., not participating.

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OVERMYER v. BARNETT ET AL.

[No. 9,940. Filed June 20, 1919.]

1. *VENUE.—Actions.—Right of.—Damage to Land From Trespass Committed in Another County.—Statutes.*—Under §1438 Burns 1914, §1318 R. S. 1881, providing that when the subject-matter of any suit shall be situate in two or more counties, the court which shall first take cognizance thereof shall retain the same, and §309 Burns 1914, §307 R. S. 1881, providing that actions for the determination in any form of rights or interest in real property and for injuries thereto must be commenced in the county in which the subject of the action, or some part thereof, is situated, where plaintiff's lands located in one county were flooded by reason of the erection of a dam in another county across the outlet of a lake, the circuit court, of the county in which the land was situated had jurisdiction of an action to abate the nuisance and damages. p. 576.
2. *WATERS AND WATERCOURSES.—Obstructing Drain.—Level of Lake.—Statute.*—In an action for damages to land where it appeared that defendants erected a dam which obstructed the flow of water from a lake through a public drain constructed by the state thirty or forty years before the commencement of the action, and because of such obstruction plaintiff's land became flooded, defendants cannot justify the obstruction on the ground that the dam restored the lake to the level existing prior to the building of the drain, so that the removal of the dam would be in violation of §6163 Burns 1914, Acts 1905 p. 447, providing for the maintenance of lakes at their level, since the statute refers to

- the maintenance of the lake at its level after the construction of the drain, such improvement being made pursuant to law. p. 580.
3. NUISANCE.—*Public Nuisance.—Abatement.—Right of Action.*—Though the obstruction of the outlet of the waters of a lake created a public nuisance by reason of flooding low ground around the lake, a landowner whose premises were overflowed and whose health and property were injured thereby may maintain an action for damages and to abate the nuisance because of special injury suffered by him. p. 582.
4. OFFICERS.—*Torts of Health Officer.—Liability.*—If the secretary of the state board of health, without authority, allowed or caused the outlet of the waters of the lake to be obstructed, so that a nuisance was created, he is liable as an individual for resulting damage. p. 583.
5. NUISANCE.—*Abatement.—Acquiescence.*—The doctrine of acquiescence does not apply to a nuisance unless it has continued for twenty years. p. 583.
6. NUISANCE.—*Actions.—Abatement.—Damages.—Complaint.—Sufficiency.*—In an action by a landowner to abate a nuisance created when a dam erected in the outlet of a lake caused plaintiff's premises to be flooded, and to recover for damages to his land resulting therefrom, complaint *held* sufficient to state a cause for damages against defendants, but not to warrant the granting of equitable relief by way of abatement and injunction, in the absence of averments showing that defendants or any one of them were at the time maintaining the dam or had any right to remove it. p. 584.

From Fulton Circuit Court; *Smith N. Stevens*, Judge.

Action by Lincoln Overmyer against John A. Barnett and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

*Holman, Bernetha & Bryant*, for appellant.

*Ele Stansbury*, Attorney-General, *Edward M. White* and *Arthur Metzler*, for appellees.

NICHOLS, P. J.—This action was brought by the appellant against the appellees in the circuit court of Fulton county, Indiana. The amended complaint is in one paragraph and is in substance as follows: The

appellant is and has been for the past twenty years the owner of certain real estate located in Fulton county, Indiana, containing in all 85.63 acres. This land borders upon, and extends into, a portion of what is known as Bruce Lake, in Fulton county, at the east and southeast end thereof. In 1903 there was established in Fulton county, Indiana, by the board of commissioners a public drain extending from the higher ground to the east and northeast of the plaintiff's said land, draining various ponds and wet lands, necessary to be drained for farming purposes, and the outlet of said ditch was and is into said Bruce Lake, across the lands of appellant, whose lands were assessed \$300, which was paid by him. Said drain was called the Overmyer ditch, and was sufficient to drain appellant's land and make it tillable so that he could raise thereon good corn and grass, and that it was worth \$60 per acre. At the west end of said land, in Pulaski county, there was a natural outlet in the way of a run or branch extending from the west end of said lake westward and northward into Tippecanoe river. Under the Swamp Land Act of the state, thirty or forty years prior to this time, a public drain was established which served as an outlet for said lake into Tippecanoe river, and at a later period, about twenty years prior to this date, the circuit court of Pulaski county established another public drain extending from the west end of said Bruce Lake along and upon the original run or branch, which deepened and widened and straightened the same by the use of a dredge and thereby said ditch became the outlet for the water running into said lake from the east on to plaintiff's land, through said Overmyer ditch. Said dredged ditch, so constructed, was maintained and

recognized to be an established outlet for the drainage from the east and southeast of said lake through said Overmyer ditch and into Bruce Lake, and the water level was kept reduced, by reason of said dredged ditch at the west end of said Bruce Lake. After the construction of said Overmyer ditch appellant put in a large quantity of tile on his said land, having the same outlet as the Overmyer ditch, and put in lateral drains at an expense of \$500, all of which were efficient and did drain appellant's land and make it tillable and valuable as farm land. In June, 1905, the Chicago, Richmond and Muncie Railroad Company, then operating along the side of said Bruce Lake and maintaining a station at said lake, for the purpose of increasing business and passenger traffic, endeavored to enlarge the area of said lake to make a resort for summer tourists, and thereby to enhance its income derived from the increased passenger traffic to and from said station; and said railroad and the other defendants, without authority of law therefor, and without regard to the rights of the appellant, erected a dam at the outlet of said lake and adjacent to said lake, the west end of which is in Pulaski county, Indiana, the remainder of said lake being in Fulton county. Such dam was in Pulaski county, and prevented the water from escaping from said lake into said outlet drain or natural course, and by reason of said dam said water was held back in the lake, causing the water level to rise from twelve to eighteen inches and thereby forcing the water back into plaintiff's said drain, destroying its efficiency and the efficiency of the Overmyer ditch and of the lateral drains, and causing appellant's said land to be submerged, as well as other lands bordering on said lake.



Said railroad company became insolvent and went into the hands of a receiver, and its property, rights and franchises were eventually sold to the Chesapeake and Ohio Railroad Company of Indiana, who is now the owner thereof as successor of the said Chicago, Richmond and Muncie Railroad Company. In the furtherance of their scheme to build said dam and to enlarge the area of said lake, without just cause and in utter disregard of appellant's rights and other landowners bordering said Bruce Lake, and without any notice whatever to appellant or other landowners, they obtained from the secretary of the board of health some order, the nature of which is unknown to the appellant, pertaining to the erection of said dam at an unreasonable elevation, thereby preventing the escape of water from the lake, and causing its water level to rise and submerge appellant's land and other lands along the shore, and to ruin the efficiency of the drain and improvement which had been established by the appellant, as well as that of other landowners. That said secretary of the board of health in the furtherance of his scheme directed the secretary of the board of health of Pulaski county to perform the things required by said railroad company with respect to said order, under the pretense that such action would tend to abate a public nuisance. After said dam was constructed, it was in part washed out so that the water level was again reduced, but the appellees, directly or through others at their expense, particularly the railroad company, and over the protests of the appellant, and against his objections to such construction, rebuilt said dam, and said appellant at said time protested against it being built, and notified the appellees that

the construction of the dam would be ruinous, and would destroy the efficiency of the drains and the efficiency of the Overmyer ditch, and cause him to lose the money he had expended in developing said land through drainage. Said dam again went out in December, 1908, and thereby reduced the level of the lake to some extent, but that the appellees again in May, 1910, over the protests and objection of this plaintiff, acting for themselves and through others, rebuilt said dam of concrete, six inches thick to a height of twelve inches, above the original construction of the dam, thereby causing the said water level of said lake to rise eighteen inches, and to shut off completely the outlet of said lake into the said public drain as established and constructed under the drainage laws of Indiana, in said county of Pulaski, and shutting off the outlet of the said lake through its natural course. That thereby the efficiency of appellant's drains was totally destroyed, and he can no longer farm his land bordering on said lake, fifty acres of which said lands are affected and entirely destroyed for farming purposes. Appellant says that he is entitled to free and unobstructed flow of the water through his drains into said lake reduced to the water level existing prior to the time of the construction of the first-mentioned dam. He has a good house on said land, and barn and other buildings built in part after the construction of the Overmyer ditch. The cellar of his house drains into said lake, and the drain was efficient to drain said cellar and keep it dry and useful. Its efficiency is now destroyed by reason of the acts of the appellees as aforesaid, which caused the water to back up into appellant's cellar, making it wet, damp and moldy, and making bad odors there-

from permeate appellant's house to the detriment of the health of himself and family. Since the erection of said dam a large area of wet, boggy and marshy lands around said Bruce Lake has been created, which affords a breeding place for mosquitoes and other insects and malaria and other disease germs, detrimental to the life and health of people living in and near the neighborhood of said lake, and during certain seasons of the year obnoxious odors and poisonous vapors arise, and the same have become a public nuisance, which did not exist before the said dam was built. That a large number of acres have been made wet and swampy and useless for any purpose. The conditions around said lake before the building of the first dam were not detrimental to public health or welfare, and did not constitute a public nuisance, but the conditions since are detrimental to public health and are a public nuisance. Others around said lake have interest in the right to have restored the original good health conditions that existed prior to the construction of said first dam, and to have the public nuisance now existing removed. The appellant is unable to realize anything from his said land, and his labor is lost, and he derives no profit whatever from fifty acres of his land. He has been damaged in the sum of \$5,000. His damages are recurring and continuous, and he has no complete and adequate remedy at law. He demands that the said nuisance be abated, and that the appellees be enjoined from maintaining said dam, and that he have damages in the sum of \$5,000.

To this amended complaint the appellees filed their demurrer upon the grounds: (1) That the court has no jurisdiction of the defendants or the subject-mat-

ter of the action. (2) The court has no jurisdiction over the subject-matter of the action. (3) There is a defect of parties defendant in this, that other parties are referred to in the complaint as having acted with the defendants in the construction of the dam, who should be made parties defendant and whose names are unknown and defendants are unable to state their names. (4) The complaint does not state facts sufficient to constitute a cause of action.

The appellees' demurrer was submitted to and sustained by the court, and the appellant refusing to plead further and electing to stand by his complaint, judgment was rendered in favor of the appellees and against the appellant on such demurrer, from which judgment this appeal is prosecuted.

The only error assigned is the ruling of the court upon the appellee's demurrer to the complaint.

The land, the injury to which is involved in this suit, is located in Fulton county, while the dam, the construction of which resulted in the injury as

1. alleged in plaintiff's complaint, is located in Pulaski county. It is the contention of the appellees that the trial court had no jurisdiction of them or of the subject-matter of the action; that such want of jurisdiction appears on the face of the complaint; that the action was for mandatory injunction and to abate a nuisance; and that the demand for damages is only incidental.

Appellees concede that by statute the courts have authority to make all proper judgments, sentences, decrees, orders and injunctions, and to issue all processes, and to do such other acts as may be proper to carry into effect the same in conformity with the Constitution and laws of this state, but that such

courts have no jurisdiction outside of their respective circuits to abate a nuisance by mandate or to enjoin its maintenance.

The appellees say that the subject-matter of this suit is wholly situate in Pulaski county and that the Pulaski Circuit Court alone for that reason has jurisdiction. The appellant contends that the action is properly brought in the Fulton Circuit Court, and cites as his authority §309 Burns 1914, §307 R. S. 1881, which provides that actions for the determination in any form of rights or interest in real property and for injuries thereto must be commenced in the county in which the subject of the action, or some part thereof, is situated.

It has been repeatedly held that actions for trespass upon land must be brought in the county in which the land is situated. The case of *Kimser v. Dewitt* (1893), 7 Ind. App. 597, 34 N. E. 1014, was an action for damages for depositing dirt upon land. *Keaton v. Snider* (1895), 14 Ind. App. 66, 42 N. E. 372, was an action for damages for the destruction of crops. *Indiana, etc., R. Co. v. Foster* (1886), 107 Ind. 430, 8 N. E. 264, was for damages by fire from a locomotive. *Du-Breuil v. Pennsylvania Co.* (1892), 130 Ind. 137, 29 N. E. 909, was an action for damages resulting from fire from a locomotive; in this case the land being located in the State of Illinois. In each of the foregoing cases it was held that the action was properly brought in the county in which the real estate was located. But §1438 Burns 1914, §1318 R. S. 1881, provides that, when the subject-matter of any suit shall be situate in two or more counties, the court which shall first take cognizance thereof shall retain the same. This enactment by the legislature of our state

was a common-law principle long before it became statutory by the action of our legislature.

The subject-matter of this action consists of two principle facts, the one being the construction of a dam, which was located in Pulaski county, and the other the resultant injury, by such erection, to real estate which was located in Fulton county. Where two material facts are necessary to give a good cause of action, and they take place in different counties, the cause of action may be said to arise in either county, and, applying this principle of law, it has been held that, where an injury has been committed in one county to real property situate in another, or where the action is founded on two or more material facts, which take place in different counties, the venue may be rested in either. *Foot v. Edwards* (1855), 9 Fed. Cas. 358, No. 4,908. 1 Saunders, Pl. and Ev. 413.

The rule is stated in 1 Chitty, Pleading (16th ed.) 281, as follows: "Where \* \* \* an injury has been caused by an act done in one county to land, &c. situate in another; or whenever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either."

The rule as stated in *Bulwer's Case* (1793), 7 Coke 2a, is as follows: That "where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will." This rule is discussed at length in the case of *Rundle v. Delaware & R. Canal* (1849), 21 Fed. Cas. 6, No. 12,139, which case approves the doctrine.

The case of *Smith v. Southern R. Co.* (1909), 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927, was an

action by the appellants against the appellees for damages resulting from the destruction of a building by an explosion of dynamite, the building destroyed being located in the State of Tennessee, while the negligent act resulting in such destruction was committed in the State of Kentucky, and in such case it was held that such an action may be brought at the option of the owner in the county and state where the land lies, or in the county and state in which the negligent act was committed, for the reason that the injury and the wrongful act must be deemed as having occurred together or in immediate connection.

The case of *Ruckman v. Green* (1876), 9 Hun 225, holds that an action may be maintained in the State of New York for an injury to land situate therein, though the business which occasions the injury and constitutes the nuisance complained of is carried on upon land situate in the State of New Jersey.

In the case of *Thayer v. Brooks* (1848), 17 Ohio 489, 49 Am. Dec. 474, the act complained of was done in the State of Pennsylvania, the injury which was occasioned by the act was sustained in Ohio, and in that case it was held that the suit will lie in either state, the court stating that, “ ‘when an injury has been caused by an act done in one county, to land, etc., situated in another, the venue may be laid in either.’ ”

In the case of *Smith v. Southern R. Co.*, *supra*, it is held that a statute making an action for injury to real property local will not be arbitrarily enforced where the injury results from a cause or act arising or occurring in a state other than the one in which the property is situated. This case has an extended case note discussing jurisdictional questions such as the one in the instant case.

In the case of *Deseret Irrigation Co. v. McIntyre* (1898), 16 Utah 398, 52 Pac. 628, which case is an action to determine the rights of the parties as to the waters of a stream flowing between a certain dam in Santete county and the canals of the plaintiffs in Miller county, and for a perpetual injunction to prohibit the defendants from using or interfering with the water of the river to which the plaintiffs claim to be entitled. In this case it was held that, where a cause of action arises in two or more counties, the plaintiffs may elect in which county they will bring their action, and that water wrongfully diverted in one county to the injury of plaintiffs' rights in another county constitutes one cause of action.

It will be readily seen that under either of the sections of the statutes above quoted, or under either of the lines of authorities cited above, the plaintiff's action was properly brought in Fulton county, for an injury sustained to his lands in that county by a trespass committed in Pulaski county, and we hold that the circuit court of Fulton county had jurisdiction of the action.

Appellees contend that the complaint is bad for the reason that it fails to aver that the dam as constructed in June, 1905, and reconstructed there-

2. after, maintained the water level of the lake above the original water level of the lake as it existed prior to the time when the water therefrom was permitted to find its own way out of the lake into the drain below. But it is averred in the complaint that thirty or forty years prior to the time of this action the state established and constructed a public drain as an outlet for the lake involved, and that about twenty years prior to the date of this action



there was established by the decree of the Pulaski Circuit Court a public drain extending from the west end of Bruce Lake substantially along the line of the original drain, deepening and widening and straightening said original drain, and that such dredged ditch carried off the water from the plaintiff's lands and drains and from the Overmyer ditch, and kept the level of said lake reduced. The statute which appellee cites being Acts 1905 p. 447, and in force March 6, 1905, and being §6163 Burns 1914, provides only for maintaining the water level of the lake at is established level.

This level, of course, was the level at which the lake was left by the construction and reconstruction of the ditch which was the outlet for the lake, and it was this level with which the defendants are charged with having interfered by the construction of the dam in June, 1905, and by the reconstruction thereof in 1910, in the first instance the water in said lake being raised from twelve to eighteen inches above said established level, and in the second to a height of twelve inches above the height occasioned by the original construction. This action has nothing to do with the level of the lake as determined by its natural outlet.

It is specifically averred in the complaint that the public drain constructed thirty or forty years before this action was commenced, and reconstructed about twenty years before, served as the outlet for the lake into the Tippecanoe river, and that the dam was erected at the outlet of the lake and adjacent to said lake, and, though appellees contend that there is no averment in the complaint that the dam as constructed and reconstructed crossed any ditch, or any part of

the same as it was originally constructed, it does not require any serious stretch of the imagination for us to conclude that the dam constructed at the outlet of the lake was constructed across such outlet, which was the ditch involved. At the time of the construction of such artificial outlet to the lake, it was not a violation of law to so construct it, and when the statute aforesaid was passed it only provided against a disturbance of the level of the lake as established by such drainage. Under the facts averred in the complaint, the removal of the dam would not reduce the level of the lake below that which had been established by law, and therefore such removal could not be a violation of said §6163 Burns 1914, *supra*.

Appellees insist that, under the averments of the complaint, the nuisance complained of is a public nuisance only, and that therefore it can only be

3. abated at the instance of the public. But while the averments of the complaint are sufficient to show that the condition growing out of the construction of the dam created a public nuisance, yet such averments also show that such condition constitutes a private nuisance to the appellant in this, that his and his family's health, his buildings and his lands, have been injured thereby, and it is a rule of law that, where one's property is injured by a nuisance created by another, the fact that the nuisance is a public one is no defense in an action for damages, and such person can sue to abate such a nuisance if he thereby suffers some special injury peculiar to himself. *Haller v. Pine* (1846), 8 Blackf. 175, 44 Am. Dec. 762; *Scheible v. Law* (1879), 65 Ind. 332; *Dwenger v. Chicago, etc., R. Co.* (1884), 98 Ind. 153; *Waltman v. Rund* (1884), 94 Ind. 225; *Haggart v.*

*Stehlin* (1893), 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577.

The appellees contend that the complaint fails to show a cause of action against either the secretary of the state or the county board of health.

4. Instead of the county board of health, the action seems to be against George Thompson, secretary of the board of health. By the averments of the complaint, the charge is that the original construction was by "the Railroad Company and the other defendants herein," and that, after the dam was washed out, as averred in the complaint, the defendants rebuilt it in a more substantial manner, and raised the dam twelve inches higher than it ever was before. Appellees say that the court judicially knows that the secretary of the state board of health has no power to make orders for the board of health, and that he is only one member of the board. If he had authority to make such orders, and he made them in the due course of his official duties, and injury resulted therefrom, it could hardly be said that he would be liable therefor; but, if he acted, as appellees contend, wholly without authority, he would then be liable for every such act contrary to, or in excess of, the authority conferred upon him by virtue of his official position. 29 Cyc 1441.

Appellees say that, because of the acquiescence of the appellant in the nuisance alleged to have been created by the appellees from the year 1910

5 until the time of bringing this action, which was in the year 1914, no injunction should now be entered; but it is held in the case of *Merchants Mut. Tel. Co. v. Hirschman* (1909), 43 Ind. App. 283, 290, 87 N. E. 238, that the doctrine of acquiescence does

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not apply to a nuisance unless it has continued for twenty years.

We find no averment in the complaint that the appellees or any one of them at the time of the commencement of this action had any control over

6. the dam in question, or that they were at said time maintaining it or had any right to destroy it or molest it. Without such averments and the proof thereof, we do not see how the appellant expects to obtain the equitable relief by way of abatement and injunction which he seeks by his complaint.

In its present form we hold that the complaint is sufficient for the recovery of damages against the defendants, but that it is insufficient for the equitable relief by way of abatement and injunction which the plaintiff seeks, and under the authority of *Miller v. Gates* (1916), 62 Ind. App. 37, 112 N. E. 538, we hold that the complaint, although insufficient for injunctive relief, states facts sufficient to entitle the plaintiff to a judgment for damages, and therefore it will withstand the demurrer for want of facts. The demurrer to the complaint should have been overruled.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and for further proceedings.

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WELLS FARGO AND COMPANY, EXPRESS, v. FIRST  
NATIONAL BANK OF HAMMOND.

[No. 9,870. Filed June 20, 1919.]

1. **APPEAL.**—*Review.*—*Evidence.*—*Sufficiency.*—*Scope of Review.*—*Weighing Evidence.*—In determining whether findings are supported by sufficient evidence, the court on appeal need only con-

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sider such evidence as tends to support the findings, and conflicting oral evidence will not be weighed. p. 589.

2. **BILLS AND NOTES.**—*Bank Checks Payable in Foreign State.—Nonpayment.—Notice to Indorser.—Law Governing.*—In an action against an indorser of bank checks payable in Illinois, the law of that state governs as to the time within which notice of nonpayment must be given to an indorser. p. 589.
3. **BILLS AND NOTES.**—*Bank Checks.—Notice to Indorser.—Sufficiency of Evidence.*—In an action against an indorser of bank checks, evidence held sufficient to sustain the finding that notice of the nonpayment of checks was given the indorser within the time required by law. p. 589.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by the First National Bank of Hammond against Wells Fargo and Company, Express. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*John M. Stinson* and *Holt, Cutting & Sidley*, for appellant.

*Jesse E. Wilson* and *Edgar D. Crumpacker*, for appellee.

NICHOLS, P. J.—The appellee commenced this action against the appellant in the Porter Circuit Court, alleging in its complaint a cause of action based upon appellant's indorsement of certain checks of the Cree Publishing Company payable to the order of appellant, and by appellant indorsed to appellee. The first of these checks is for \$906.96, dated November 19, 1912, and the second is for \$1,447.30, dated November 27, 1912. There is a third check for \$3.95, upon which there is no recovery.

The complaint is in eight paragraphs, to which an answer of six paragraphs is filed. Plaintiff's reply to the answer in one paragraph put the case at issue. It was tried by the court without a jury, and a spe-

cial finding made, upon which conclusions of law were stated in favor of appellee. Judgment was rendered in favor of appellee and against appellant in the sum of \$2,661.51. After its motion for a new trial was overruled, the defendant appealed.

Appellant presents fifteen specifications of error upon which it relies for reversal, all of which that are available to appellant are embraced in appellant's statement: That it "relies for reversal upon the insufficiency of the proof to show the receipt by it of the notice of the nonpayment of each of the checks herein set out within the time required by law, both in accordance with the statutes of Illinois, where the checks were payable, and which were introduced in evidence in the court below, and in accordance with the law of the State of Indiana, where the checks were negotiated and delivered to the plaintiff. The grounds for reversal thus presented were set forth in the motion for a new trial, and argued in the court below. They were overruled."

The substance of so much of the special findings of fact as is necessary to this opinion is as follows: On November 19, 1912, the Cree Publishing Company, of the city of Hammond, Indiana, drew, executed, and delivered a check in said city to defendant, for \$906.96 upon the Colonial Trust and Savings Bank of the city of Chicago, Illinois, payable to the order of the defendant. On November 21, 1912, the cashier of the defendant, acting for and on behalf of the defendant, sold, indorsed and delivered said check to the plaintiff, in due course of business, receiving par value therefor. On November 21, 1912, plaintiff sent said check by mail to its correspondent, Continental and Commercial National Bank of Chicago, Illinois, for

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collection. On November 22, 1912, said correspondent presented said check to said Colonial Trust and Savings Bank and demanded payment thereof, which was refused for the reason that the drawer had no funds to its credit in said bank. The check was thereupon on said date protested by a notary public and proper notice of said protest and nonpayment was mailed on said date to the plaintiff at Hammond, with a duplicate notice of nonpayment and protest inclosed, addressed to the defendant, which notice to the plaintiff and defendant was received by the plaintiff on November 23. On the day following, to wit, November 23, 1912, the assistant cashier of plaintiff, at its bank in said city of Hammond, during business hours, notified the agent of defendant of said nonpayment and protest, and that defendant would be liable to plaintiff for the payment of said check. On November 27, 1912, said Cree Publishing Company drew a check payable to the order of the defendant upon the said Colonial Trust and Savings Bank at Chicago, for \$1,447.30. Said check was drawn, signed and delivered to the defendant in the city of Hammond. On the 30th day of said month, which was Saturday, the defendant, by and through its cashier, sold, assigned and indorsed said check to the plaintiff at its said banking house in the city of Hammond, and duly indorsed the same in the course of business, during business hours, and received therefor its face value. Plaintiff on said day sent said check by mail to its correspondent, the Continental and Commercial National Bank of Chicago, for collection. On Monday, December 2, following, said correspondent presented said check, during business hours, to said Colonial Trust and Savings Bank, and demanded payment,

which was refused for the reason that there were no funds to the credit of the drawer of said check. Thereupon on said day said check was duly protested by a notary public, and notice of nonpayment and protest of said check was sent by mail on the day of its protest to the plaintiff. Plaintiff received said notice, together with notice directed to the defendant, as the indorser, on December 3. On said date, during business hours, the plaintiff, by its cashier, notified the defendant by telephone communication, through its cashier, who was then on duty, informing him of the nonpayment and protest of said check, and that the plaintiff would hold the defendant as indorser liable for the payment thereof. That either on the day the plaintiff received the notice of nonpayment and protest of said check or on the day thereafter, at farthest, said plaintiff, by its cashier, orally notified the defendant's cashier, during business hours, of the nonpayment and protest of said check, and that the defendant would be held liable as indorser for the payment thereof. Each of said checks was given to the defendant by the Cree Publishing Company in payment of money it owed defendant as the proceeds of sales of money orders which it sold for and on behalf of said defendant as defendant's agent. Plaintiff purchased each of said checks in due course and in good faith for a valuable consideration, and exercised due and proper diligence in giving the defendant notice of the nonpayment and protest of each of said checks. The protest fees on said checks were \$5.16. The plaintiff has received on said checks \$216.12, and the balance of said checks, together with interest from date of protest and protest fees, is wholly unpaid.

In determining whether the findings as to notice are



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supported by sufficient evidence, we need only to consider such evidence as tends to support the

1. findings. *Robinson & Co. v. Hathaway* (1898), 150 Ind. 679, 50 N. E. 883. And conflicting oral evidence will not be weighed. *Hudelson v. Hudelson* (1905), 164 Ind. 694, 74 N. E. 504.

The checks involved being payable in Illinois, the law of that state governs as to the time within which notice of nonpayment must be given to an in-

2. dorser. *Brown v. Jones* (1890), 125 Ind. 375, 25 N. E. 452, 21 Am. St. 227. And such law is fixed by statute of that state, which provides that notice to an indorser must be given by the close of the day following the receipt, in this case by appellee, of the notice of the dishonor of the checks. Illinois Negotiable Instruments Law of 1917, §§88, 93, 102, 106.

Witness Morton Towle, assistant cashier of appellee's bank, testified that in a conversation with Mr.

Bowls, local agent of appellant, at Hammond,

3. within a day or two after the notice of protest of the first check, he informed him of the fact that the check had gone to protest, admonishing him to look after it immediately. On cross-examination, he said that it was the next day after the check was returned, and that it was on the day that the notice of protest came to the bank. While the witness was somewhat confused in his statements, his evidence was sufficient to sustain the finding of the court as to the first check.

Witness Belman, cashier of appellee's bank, testified that the second check was brought to appellee's bank on Saturday, November 30, 1912. It was dishonored in Chicago, on Monday, December 2, 1912, and that immediately upon getting the certificate of

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protest, which was the day after the protest of the check, being on Tuesday, December 3, 1912, he called Mr. Berwanger, cashier of appellant's company, by phone, and notified him that the second check had come back, and that he wanted them both paid at once. This evidence is sufficient to sustain the finding as to the second check.

The judgment is affirmed.

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LEWIS ET AL. v. POPEJOY ET AL.

[No. 9,954. Filed June 20, 1919.]

**BROKERS.—Real Estate Brokers.—Exchange of Lands.—Commissions.—Necessity of Written Contract.—Statute.**—Under §7463 Burns 1914, Acts 1913 p. 638, a real estate broker cannot recover a commission for his services in bringing about an exchange of land unless he has a contract with his employer in writing.

From Wells Circuit Court; *William H. Eichhorn*, Judge.

Action by Harry E. Popejoy and others against Sam Lewis and another. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

*Frank W. Gordon*, for appellants.

**McMAHAN, J.**—Appellants owned a farm of eighty acres, which they desired to exchange for a smaller one. They engaged appellees, who were real estate brokers, to find an owner of a small farm who would exchange farms with appellants. The only question for our determination is: Must contracts of this character to be in writing in order to bind the owner of the

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real estate for the payment of a commission? If so, this cause must be reversed; otherwise affirmed.

It was held in *Elmore v. Brinneman* (1919), *ante* 222, 123 N. E. 248, that §7463 Burns 1914, Acts 1913 p. 638, applied to a contract of this character, and that the broker could not maintain an action for his commission unless the contract was in writing.

The court erred in its conclusions of law. Cause reversed, with direction to the court to restate its conclusions of law in favor of appellants, and to render judgment accordingly.

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STATE OF INDIANA, EX REL. THORLTON v. PUCKETT,  
TRUSTEE, ET AL.

[No. 9,879. Filed June 20, 1919.]

1. **TOWNS.—Public Improvements.—Payment of Laborers and Materialmen.—Statute.**—Section 5901a Burns 1914, Acts 1911 p. 437, providing that public officers and boards contracting for public improvements shall withhold full payment to the contractor until he has paid subcontractors or laborers employed in the work, and requiring such claims to be filed within thirty days after the completion of the work, is for the protection of laborers, materialmen and subcontractors and not of contractors and their bondsmen, and confers no right of action on any one unless the public officer wrongfully fails to withhold money due the contractor which should have been applied to claims previously filed in accordance with the statute. p. 595.
2. **TOWNS.—Trustees.—Action on Bond.—Complaint.—Sufficiency.**—In an action by a surety on the bond of a public contractor against a township trustee and his bondsmen to recover for an alleged wrongful payment by the trustee to a public contractor before the claims of materialmen and subcontractors had been paid, a complaint failing to allege the filing of claims of subcontractors and materialmen prior to the time of payment to such contractor is insufficient to show a violation of §§5901a, 5901b Burns 1914, Acts

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1911 p. 437, it being presumed that the trustee performed his statutory duties and therefore that no claims had been filed pursuant to such statutes. p. 596.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by the State of Indiana, on the relation of Wallace Thorlton, against Elihu Puckett, trustee, and others. From a judgment for defendants, the relator appeals. *Affirmed.*

*Cary L. Harrel* and *Walker & Blankenbaker*, for appellant.

*E. S. Holliday*, *F. A. Horner*, *S. M. McGregor*, *A. W. Knight*, *A. C. Miller* and *Edward H. Knight*, for appellees.

McMAHAN, J.—This action was brought by relator on the bond of appellee Elihu Puckett, as trustee of Lewis township, Clay county, Indiana. The appellees other than Elihu Puckett are sureties on said bond. The only error assigned relates to the action of the court in sustaining a demurrer to appellant's complaint. The complaint, after alleging the election and qualification of said Puckett, alleges the execution of the bond in suit, the conditions of which bond were that said Puckett "shall well and faithfully discharge the duties of said office according to law; shall faithfully collect and receive all moneys belonging to said township; expend the same as required by law," etc., a copy of which bond is filed with and made a part of the complaint; that said Puckett, as such trustee, entered into a written contract with Farabee and Berry for the alteration and repair of a certain schoolhouse belonging to said township, under the terms of which contract said contractors were to do all the work and furnish all the material therefor for \$7,356; that at the time of the execution of said con-

tract, and as a part of the consideration therefor, said contractors executed a bond in the sum of \$7,356, with relator and others as sureties thereon, which said bond obligated and bound said sureties for the payment of all claims for work, labor and material furnished or done under or pursuant to the said contract of Farabee and Berry for said alteration, repair and improvement, and for the payment of all subcontractors who contracted with said Farabee and Berry to furnish material or do any part of said work undertaken by said Farabee and Berry as aforesaid; that at the request of said contractors, certain named parties furnished material and performed labor for said contractors in the alteration and repair of said schoolhouse to the extent of \$3,978.07, which said contractors failed to pay, and which said sum the sureties on said contractors' bond were compelled to and did pay; that the relator as one of said sureties was obliged to and did pay one-seventh of said sum or \$568.07; that each of said materialmen and laborers filed their claims for the amount due each of them with said trustee within thirty days from the time of furnishing the material and the completion of the work done by said parties; that no dispute arose between said contractors and the said parties who furnished labor and material; that said trustee unlawfully and in violation of the duty enjoined upon him by law failed to withhold full payment to said contractors, Farabee and Berry, until said contractors had paid to said materialmen and laborers, and each of them, all bills due and owing them; that the contractors' bondsmen were required to pay said sum of \$3,978.07 by reason of the failure of said trustee to so withhold payment to said contractors; that said

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trustee, in violation of the statutory law of this state, paid said contractors, who had not paid for any of the material or labor hereinbefore mentioned, \$6,000, and that, by reason of the unlawful acts of said Puckett in failing to withhold full payment, relator was compelled to and did pay said sum of \$568.07; that when relator signed said contractors' bond he believed said Puckett would faithfully perform his duties as trustee and would withhold full payment to said contractors until all bills due and owing by them for material and labor were paid, and that relator relied upon said Puckett as such trustee to perform faithfully all the duties and obligations imposed upon him by reason of his official bond and the laws of the State of Indiana, and that, if said Puckett had faithfully performed his duties required by law, the relator would not have been compelled to pay any sum whatever upon the said contractors' bond so executed by relator and others, and demanding judgment for the amount so paid by relator.

The relators' contention is that under §§5901a, 5901b Burns 1914, Acts 1911 p. 437, it was the official duty of appellee Puckett, as trustee, to have withheld full payment to the said contractors until all bills due for labor and material had been paid.

Section 5901a, *supra*, provides that certain public officers and boards when authorized to contract for any public building or improvement "shall withhold full payment to the contractor until such contractor has paid to the subcontractor or subcontractors or laborers employed in such construction, all bills due and owing the same: Provided, There is a sufficient sum owing to the contractor to pay all such bills, and if there is not a sufficient sum owing to such contractor on such contract to pay all of such bills, then the sum

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owing on said contract shall be prorated in payment of all such bills: Provided, Such subcontractor or subcontractors or laborers shall file with the trustees or board or commission their claim within thirty days from the completion of the work. Where no dispute shall arise between the contractor and the subcontractor or to the laborer, the trustees, board or commission shall pay such claim or claims out of the funds due such contractor, and take receipt therefor, which sum or sums shall be deducted from the contract price. Where there is a dispute between the contractor and the subcontractor or laborers, sufficient funds shall be retained by the board, trustees or commission until such disputes are settled, and the correct amount is determined when payment shall be made as aforesaid."

It is quite clear that the purpose of this statute is the protection of the laborers, materialmen and subcontractors, and not the protection of the con-

1. tractors or their bondsmen. It will be observed that the language of the statute is that the "trustees shall withhold full payment to the contractor until such contractor has paid to the subcontractor or subcontractors or laborers employed in such construction, all bills due and owing the same," provided, *that if there is not a sufficient amount owing to pay all such bills, then the sum owing shall be prorated in payment of all such bills:* and provided further, that "such sub-contractor or subcontractors or laborers shall file with the trustees or board or commission their claim \* \* \* within thirty days from the completion of the work:"

There is no provision in the act which requires the trustee to withhold any payment from the contractor

prior to the filing of such claims, and the trustee is not obliged to assume in advance of such filing that any claim will be filed with him. Clearly this statute confers no right of action on any one unless the trustee wrongfully fails to withhold and pays to the contractor money due the latter which he should apply to the payment, either in full or *pro rata*, of claims previously filed in accordance with the statute.

The proviso for prorating claims "if there is not a sufficient amount owing to such contractor on such contract to pay all of such bills" clearly indicates that the trustee is obliged to withhold full payment only after claims are filed.

The averments of the complaint show that the contract price of the improvement was \$7,356, and that of this amount the trustee paid \$6,000 to the

2. general contractors, it thereby affirmatively appearing that said trustee retain in his hands a considerable sum due the contractors. There is no allegation anywhere in the complaint that any of the subcontractors or materialmen filed any claim with the trustee prior to his paying out the entire \$6,000 above referred to. The want of such allegation would be absolutely fatal to a complaint by any of said claimants in an action against the trustee under this statute; and it is necessarily fatal to the relator's complaint, who claims his right through said claimants by reason of subrogation. The presumption of law is, as against this pleading, that the trustee has performed his statutory duties; and thus it will be presumed that none of the claims mentioned in the complaint were filed with the trustee prior to his paying out the \$6,000, and that upon said claims being filed he withheld the balance of the contract price for the



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purpose of permitting it to be prorated among the claimants pursuant to the statute. The complaint therefore fails to show any violation of said statute by said trustee, regardless of whether relator can base any right of action on that statute. This being true, there was no error in sustaining the demurrer.

Judgment affirmed.

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INDIANAPOLIS CONSERVATORY OF MUSIC v. McCONNELL.

[No. 9,853. Filed June 20, 1919.]

1. EXECUTORS AND ADMINISTRATORS.—*Assignment of Contracts.—Consideration.*—Where plaintiff's sister left defendant's conservatory before completing her paid-up course of study under a written contract between her father and defendant, and defendant and plaintiff verbally agreed that the latter might receive the remaining instructions under the contract, plaintiff, upon her appointment as administratrix of her father's estate and assignment of the contract by her as administratrix to herself as an individual, could not recover for a breach of the verbal contract in the absence of evidence showing consideration in that she had succeeded to the rights of her father in the original contract. p. 603.
2. CONTRACTS.—*Breach.—Action.—Pleading and Proof.*—In an action for an alleged breach of a contract to pay the purchase price of an automobile in living and tuition in defendant's school, a money demand was not authorized in the absence of pleading and proof of a breach of contract by defendant. p. 603.

From Marion Superior Court (100,653); *Theophilus J. Moll*, Judge.

Action by Sarah I. McConnell against the Indianapolis Conservatory of Music. From a judgment for plaintiff, the defendant appeals. *Reversed.*

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*Pickens, Moores, Davidson & Pickens*, for appellant.

*Charles T. Kaelin* and *Elias D. Salsbury*, for appellee.

NICHOLS, P. J.—The appellee commenced this action by filing her complaint in the Marion Superior Court, which complaint was succeeded by an amended complaint and later by a reamended complaint, which said reamended complaint is identified in the record as an amended complaint and was the one upon which the case was tried.

It is in substance as follows: The appellant is indebted to the appellee in the sum of \$147.95, with interest for money had and received from the appellee, all of which is more fully set out in the bill of particulars filed herewith, and which is a balance due the appellee by virtue of a verbal contract and agreement between appellee and appellant. Heretofore, to wit, January 1, 1910, William T. McConnell, father of appellee, sold an automobile to appellant for \$450, in consideration of which appellant promised and agreed in writing, a copy of which agreement is filed herewith, to give appellee's sister certain living and tuition expenses in its conservatory of music. Appellee's sister, with the consent of the appellant, left said institution before all of said money was used therefor, and it was agreed verbally by appellee and appellant that appellee could use the unused money for tuition and living expenses in appellant's said conservatory. That heretofore, to wit, on the — day of —, 19—, William T. McConnell died, and this appellee was appointed administratrix of his estate in Daviess county, Indiana. Appellee, as such administratrix, by permission of the

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court, assigned to herself, individually, any and all interest that she had as such administratrix in such contract, filed her final report as such administratrix, which was approved by the court, and she was discharged from said trust, which was closed. On October 4, 1914, it was verbally agreed between the appellee and appellant that the appellant under the said contract was indebted to appellee in the sum of \$327.45. Appellee thereupon entered said school and received living and tuition in sums amounting to \$179.50. Appellee has performed all of the contract on her part to be performed, and there is now due and unpaid to appellee the sum of \$147.95, which appellant has wholly failed, neglected and refused to pay on demand. There is a demand for judgment of \$175 and costs.

The bill of particulars filed with and as a part of said complaint was as follows:

Exhibit A to Complaint.

(transcript pp. 4, 5)

Jan. 1, 1910. O. M. Leader auto-	
mobile .....	\$450.00
June 30, 1911. Balance due on	
acc't. ....	\$24.00
Jan. 1, Apr. 4, 1911. 23 voice les-	
sons at \$2.50 per lesson.....	57.50
Jan. 1, Apr. 4, 1911. 14 piano les-	
sons at \$1.40 per lesson.....	19.60
Jan. 1, Apr. 4, 1911. 6 weeks'	
board at \$7.50 per week.....	45.00
Jan. 1, Apr. 4, 1911. 6 weeks'	
board at \$6.87½ per week.....	48.13
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	\$255.77

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Three lessons in voice and six lessons in piano  
missed on account of sickness, during which time  
student was home for three weeks.

8 per cent. interest on balance for

3½ years from April 4, 1911,

to October 4, 1914.....\$71.68

Total due Sarah I. McConnell,

October 4, 1914.....327.45

Sept., 1911-June, 1913.

Counterpoint lessons taken

by Sarah I. McConnell,

through correspondence, 7

counterpoint lessons at

\$2.50 .....\$17.50

Oct. 3, 1914.

Lessons to Sarah I. McCon-

nell, under Daniel Jones,

24 at \$3 per lesson..... 72.00

October 3, 1914.

Board and room for 12

weeks at \$7.50 per week.. 90.00

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Balance due Sarah I. McConnell..       \$147.95

The original contract filed with and as a part of  
the complaint is as follows:

“This agreement made this 2nd day of Janu-  
ary, 1911, by and between The Indianapolis Con-  
servatory of Music, of Indianapolis, Indiana, by  
and through Edgar M. Cawley, its Director, first  
party, and Mr. William T. McConnell, of Wash-  
ington, Indiana, second party, witnesseth:

“That first party does hereby agree to furnish  
to Miss Abigail McConnell, daughter of said sec-  
ond party with board and room in the Conserva-

tory Building of said first party, in a comfortable room on second floor south, including light, heat, plain washing and use of piano, voice tuition two lessons per week, Artist Department, piano-forte tuition, two lessons per week, Normal Department, for a period of twenty-five weeks, beginning January 2nd, 1911, and ending June 30th, 1911, for a sum total of \$382.50. This amount in addition to a balance of \$24.00 upon season 1909 and 1910, which balance second party now owes said first party, total \$406.50, shall be credited as cash payment on the purchase price of a machine (Leader Automobile—five passenger touring car) model D, and No. 209, which first party agrees to accept from second party at the price of \$450.00. The difference between the total charge for board and tuition \$382.50 and balance \$24.00, viz.: \$406.50, and the price of the machine, \$450.00, which is \$43.50, shall be credited upon account of living and tuition for daughter of second party, beginning September, 1911.

“Second party agrees to turn the machine over to first party January 2nd, 1911, guaranteed to be in first-class condition, reasonable wear and tear excepted, the machine to include full set of tools, jack and pump, top complete with side curtains and wind shield, (the wind shield for the car is a part of the top), all in good condition and agrees to receive as full consideration therefor the board, lodging and tuition herein provided for.

“It is further agreed that a clear title shall be given for said machine to first party by second party.

“Second party further agrees to deliver said machine to the B. & O. S. W. Ry. Co., at Washington, Indiana, and forward bill of lading to the first party.

“Witness our hands in duplicate on the 2nd day of January, 1911.

“The Indianapolis Conservatory of Music,  
“Edgar M. Cawley, Director,  
“William T. McConnell.”

Appellant answered this complaint by general denial. The cause was submitted to the jury for trial, which returned a verdict in favor of the appellee in the sum of \$63, upon which judgment was rendered against the appellant, and from which judgment after appellant filed its motion for new trial, which was overruled, this appeal is prosecuted.

The errors assigned by appellant are: (1) Trial court erred in overruling appellant's amended demurrer to amended complaint. (2) The trial court erred in overruling appellant's motion for new trial.

The first assignment is without force and is evidently presented by counsel for appellant by inadvertence. While there was an amended demurrer to the amended complaint (which by the way was sustained), there was no demurrer filed to the reamended complaint. The next proceeding after such reamendment was filing the answer in general denial aforesaid.

The only error to consider is the action of the court in overruling the motion for new trial, which presents the questions of the sufficiency of the evidence to sustain the verdict, as to whether the damages are excessive, and as to whether the verdict is contrary to law.

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There is evidence of the death of William T. McConnell and of the appointment of the appellee as administratrix of his estate, but there is no

1. evidence of any disposition of his contract with appellant, by assignment to appellee, or otherwise, nor is there any evidence as to the final settlement of the estate. It does not appear from the evidence that the widow and heirs of William T. McConnell ever released their interest, if any, in the contract with appellant, or that appellee ever succeeded to the rights of her father therein. Without this evidence there is no consideration whatever shown for the verbal contract which is the basis of appellee's action. Without a consideration there can be no recovery on the contract. *Taylor v. Leeson* (1905), 35 Ind. App. 620, 74 N. E. 907; *Bright v. Coffman* (1860), 15 Ind. 371, 77 Am. Dec. 96; Elliott, Contracts §195; *Mount v. Dehaven* (1902), 29 Ind. App. 127, 63 N. E. 330; *Kelso v. Fleming* (1885), 104 Ind. 180, 3 N. E. 830; *Pope v. Vajen* (1889), 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688.

In the original contract with William T. McConnell the consideration for the automobile was living and tuition for said McConnell's daughter, and in

2. the verbal contract between appellee and appellant, had there been a valid consideration for such verbal contract, appellant was bound only to pay in living and tuition, and this does not authorize a money demand in the absence of a breach of the contract by appellant. *Wilson v. Dale* (1861), 16 Ind. 399; *Leiter v. Emmons* (1898), 20 Ind. App. 22, 50 N. E. 40. There can be no recovery for a broken contract unless a breach thereof is pleaded and proved. *Brickey v. Irwin* (1890), 122 Ind. 51, 23 N. E. 694;

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Carter v. School Township, etc.—70 Ind. App. 604.

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*Riley v. Walker* (1892), 6 Ind. App. 622, 627, 34 N. E. 100. No breach of the contract is either pleaded or proved. The verdict is not sustained by sufficient evidence.

The judgment is reversed, with instructions to the trial court to sustain the motion for a new trial.

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CARTER v. SCHOOL TOWNSHIP OF LIBERTY ET AL.

[No. 9,929. Filed June 20, 1919.]

SCHOOLS AND SCHOOL DISTRICTS.—*Property.—Grant for School Purposes.—Abandonment of Use.—Effect.*—Where land was granted to the trustee of a school township on condition that it should revert to the grantors whenever it ceased to be used for school purposes, the grantor is entitled to retake the property, where it ceased to be used for the purpose set forth in the grant, regardless of the fact that the township trustee, acting under §6422 Burns 1914, Acts 1907 p. 444, which was enacted after the grant, abandoned the school because the average daily attendance was twelve pupils or less, as the conditions embraced in the conveyance could not be affected by subsequent legislation.

From Grant Circuit Court; *J. F. Charles*, Judge.

Action by John A. Carter against the School Township of Liberty and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

*Bell & Dickey* and *R. L. Ewbank*, for appellant.

*Orlo L. Cline*, for appellees.

McMAHAN, J.—This is an action commenced in May, 1916, by appellant, to quiet his title to a tract of one acre upon which stands a building which was erected for a schoolhouse. It appears from the evidence that in 1897 appellant and his brother owned adjoining eighty-acre tracts of land, and in that year



each deeded adjoining half-acre tracts, to the school trustee, and his successors in office, each of said deeds containing the following provision: "Whenever this property ceases to be used for school purposes it is to revert to the grantors herein, their heirs or assigns." Appellant's brother has since died, and appellant purchased his brother's eighty acres and moved thereon, and has purchased by quitclaim deed all rights of his brother's heirs in the half-acre tract deeded by the brother.

The township trustee in the spring of 1913 discontinued and abandoned this school, for the reason that during the previous school year the average daily attendance had been fewer than twelve. Harlin Haisley, who was the township trustee from 1909 to January 1, 1915, testified that when he discontinued the school it was temporarily abandoned; that in 1914 the parents residing in that school district filed a petition with him, asking that the school be opened again; that the enumeration was taken, and that there were only seven or eight pupils in the district; that he could not under the law open the school at that time; that the only reason the school was discontinued was on account of there not being a sufficient number of pupils; that, if there had been enough pupils in this district the school would not have been closed. This school is in district 14. The building cost about \$3,000 and is in a fair state of preservation. The seats were taken out in 1914. The pupils were enumerated each year as belonging to district 14, but were attached to another district for school purposes. The appellant took possession of the building and real estate about a year before this action was commenced.

Judgment having been rendered against the appel-

lant, he filed a motion for a new trial, wherein he challenged the decision of the court on the grounds: (1) That it is not sustained by sufficient evidence; and (2) that it is contrary to law.

Appellee contends that it was forced to discontinue the school by reason of the provision of §6422 Burns 1914, Acts 1907 p. 444, which requires that all schools shall be discontinued and temporarily abandoned when the average daily attendance during the preceding year has been twelve pupils or fewer, and that the decision of the court was therefore correct. The statute referred to was enacted in 1907 and amended in 1909. It is our judgment that this statute has no bearing upon the question before us. The rights of the parties were fixed by the conditions mentioned in the deeds conveying the property to appellee, and those rights cannot be impaired by subsequent legislation. It is the duty of the court to decide this case without giving consideration to the said statute. That the appellee ceased to use the property for school purposes cannot be denied. The fact that the cessation was brought about by virtue of the statute can make no difference. The property had not been used for school purposes since the spring of 1913, a period of more than three years. Our judgment is that the evidence shows, without conflict, that the appellees intentionally ceased to use the property in controversy for school purposes, and that the court erred in overruling the motion for a new trial. See *Fall Creek School Tp. v. Shuman* (1913), 55 Ind. App. 232, 103 N. E. 677.

Judgment reversed, with direction to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

## DRURY, GUARDIAN, ET AL. v. KROGMAN.

[No. 9,407. Filed November 1, 1918. Rehearing denied January 31, 1919. Transfer denied June 20, 1919.]

1. **INTOXICATING LIQUORS.—Damages.—Sale of Liquor.—Directing Verdict.—Evidence.**—In an action against a liquor seller for death caused by an intoxicated person, where there was evidence, though wholly circumstantial, which would have warranted the jury in finding that defendant sold the liquor to the person causing the death, as averred in the complaint, the trial court was not justified in directing a verdict for defendant solely on the ground that there was no evidence to support that particular averment. p. 612.
2. **DEATH.—Wrongful Death.—Right of Action for Damages.**—The right to maintain an action for damages for wrongfully causing the death of a human being is purely statutory. p. 612.
3. **DEATH.—Action for Wrongful Death.—Who May Sue.—Statute.**—Under §285 Burns 1914, Acts 1899 p. 405, relating to the recovery of damages for wrongful death, the administrator is the only person who can maintain such an action. p. 612.
4. **INTOXICATING LIQUORS.—Illegal Sales.—Injury to Means of Support.—Death of Mother.—Right of Children to Recover Damages.—Statutes.**—Even though §20 of the act of March 17, 1875, §5323 R. S. 1881, which was §8355 Burns 1906, giving any person injured in his means of support on account of the use of intoxicating liquor illegally sold a right of action against the seller, was not repealed by the act of March 4, 1911 (Acts 1911 p. 244, §8323d *et seq.* Burns 1914), children surviving a mother who was shot and killed by an intoxicated person could not recover from the one who sold the liquor, in an action based on the theory that they had been damaged in their means of support, where they and the mother lived with the father as members of a common family, since it was the father's duty, and not that of the mother, to support the children, and he was entitled to the services of the wife. p. 613.

From Crawford Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Charles R. Drury, as guardian of his five minor children, against William Krogman, wherein such children were substituted as parties plaintiff.

From a judgment for defendant, the plaintiffs appeal.  
*Affirmed.*

*Robert W. Armstrong, Charles Brown and Samuel A. Lambdin*, for appellants.

*Norman E. Patrick and John W. Ewing*, for appellee.

This action was instituted by Charles R. Drury in his capacity as guardian for his five minor children, against William Krogman, to recover damages for the death of his wife, who was the mother of said children. He filed his complaint September 4, 1911, in the circuit court of Perry county and on his motion the cause was venued to the circuit court of Harrison county. In the latter court the children filed their petition to be substituted as parties plaintiff and to be permitted to prosecute their cause of action as infant poor persons. Their petition was granted and the substitution was made on the order of the court. The children then filed their complaint, denominated "amended complaint." Demurrer to the "amended complaint" for want of facts was overruled. Answer in four paragraphs. On defendant's motion the cause was venued to the Crawford Circuit Court. Verdict for the plaintiffs in the sum of \$2,500. This verdict was set aside by the granting of a new trial. A change of venue was then taken from the regular judge and a special judge was appointed. A second trial resulted in a verdict for plaintiffs in the sum of \$7,000. The second verdict was set aside by the granting of a new trial. On the third trial, when plaintiffs' evidence in chief had been introduced, the court gave the jury a peremptory instruction to return a verdict for the defendant. Motion for new trial overruled. Judgment accordingly.

So much of the amended complaint as is necessary to an understanding of the question presented by this appeal is as follows: "That the defendant, at the time of the injuries hereinafter complained of, was a licensed vendor of intoxicating liquors in Tell City, Indiana; that as such licensed vendor of intoxicating liquors, on January 7, 1911, the defendant unlawfully sold, bartered, gave and delivered intoxicating liquor to one Joseph Weigand who was then and there in a state of intoxication and was wild, mad, insane, crazy and drunk, and was then and there known to be in that condition by the defendant; that the defendant not only sold, gave, bartered and delivered intoxicating liquor, as aforesaid and under the conditions as aforesaid, but he caused the same to be sold, bartered, given and delivered to said Weigand at said time in less quantity than a quart at a time, while said Weigand was then and there in a state of intoxication, crazy, insane, drunk, wild and mad, and known to be in said condition by defendant and his agents and servants at the time of said sale; that said intoxicating liquor was taken and accepted by said Weigand and then and there drunk by him; that said intoxicating liquor caused said Weigand to become more intoxicated; that while in this intoxicated condition and by reason thereof, said Weigand unlawfully and wrongfully and without right, shot with a pistol loaded with powder and leaden ball one Rachel C. Drury, mother of plaintiffs herein, thereby causing her death, all without fault or negligence on her part. That the death of said Rachel C. Drury was caused solely by reason of the unlawful sales, gifts, barter and deliveries of intoxicating liquor by the defendant and his agents and servants to said Weigand while the

said Weigand was in a state of intoxication and known to be in said condition by the defendant, his agents and servants. That said Rachel C. Drury, at the time of her death, was thirty years of age with a life expectancy of thirty-five years; that she was a strong, able-bodied, healthy and industrious woman, and was well worth to her said children, by way of nurture, care, training, education and support, the sum of \$25.00 per week; that said Rachel C. Drury left surviving, as her heirs at law and next of kin, her five children, the plaintiffs herein; that the names and ages of said children are as follows: Myrtle, 13 years; Legatha, 11 years; Morris, 9 years; Charles, 7 years; and William, 3 years. That at the time of her death their said mother was contributing to the care, nurture, support, and training and education of the plaintiffs herein; that by reason of the above and foregoing grievances the plaintiffs say that a cause of action has accrued to them against the defendant and that the plaintiffs have been damaged by reason of said grievances, in their person, property and in their means of support, in the sum of \$10,000.00."

On motion of the defendant the words "wild," "mad," "insane" and "crazy" were stricken from the complaint. Likewise the words "person" and "property" were stricken, leaving the concluding averment to be read as follows: "Said wards have been damaged in their means of support in the sum of ten thousand dollars."

Appellants have assigned as error the overruling of the motion for a new trial, which motion rested on the action of the trial court in directing the verdict, and appellee has assigned as cross-error the ruling on the demurrer.

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Drury, Gdn., v. Krogman—70 Ind. App. 607.

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DAUSMAN, J.—The evidence shows that Joseph Weigand was an old reprobate and habitual drunkard. His depravity was known generally in the community where he lived at the time of the commission of the crime described in the complaint, and had been so known for a long time prior thereto. Charles R. Drury was Weigand's next-door neighbor. The Drury family consisted of himself, his wife, and their five children. At the time of her death the husband, wife, and children were living together, as a family, and the wife and children were being supported by him. Throughout the night before the commission of the crime Weigand was intoxicated and had disturbed the neighborhood by his drunken ravings. During the forenoon of January 7, 1911, he continued in a state of intoxication. In the immediate neighborhood of the Drury home, across the street therefrom and in view thereof, was a distillery and salesroom of which William Krogman was proprietor. Krogman was well acquainted with Weigand, and for a long time had supplied him with liquor. About noon of said day Weigand went into the salesroom with an empty quart bottle. Soon afterward he came from the direction of the salesroom, making his way homeward, with a quart bottle full of whisky. Between 2 and 3 o'clock p. m. of that day he emerged from his house with a rifle, and, without any provocation whatever, he shot Mrs. Drury, who was working in the yard of the Drury home, inflicting a wound from which she died eight days thereafter. At the time of the shooting Weigand was in a crazed condition superinduced by the excessive use of whisky. Krogman was not licensed under the laws of Indiana to sell, barter, or give away intoxicating liquor.

Did the trial court err in directing the verdict? The evidence as to where, how and from whom Weigand procured his whisky about two hours before the

1. commission of the deplorable crime is wholly circumstantial. However, we are of the opinion that the evidence would have justified the jury in finding that he procured the whisky as averred in the complaint. The trial court, therefore, was not justified in directing the verdict solely on the ground that there is no evidence to support that particular averment. But it would be folly to permit this litigation to proceed, for any judgment which appellants might recover would have to be set aside ultimately for other reasons.

The right to maintain an action for damages for wrongfully causing the death of a human being did not exist at common law. That right as it now

2. exists is purely statutory. *Indianapolis, etc., R. Co. v. Keeley's Admr.* (1864), 23 Ind. 133; *Jackson v. Pittsburgh, etc., R. Co.* (1895), 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; *Pittsburgh, etc., R. Co. v. Hosea* (1899), 152 Ind. 412, 53 N. E. 419.

The general statute on this subject is §285 Burns 1914, Acts 1899 p. 405, but under this section the administrator is the only person who can main-

3. tain the action. *Yelton, Admr., v. Evansville, etc., R. Co.* (1893), 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158; *Pittsburgh, etc., R. Co. v. Moore* (1899), 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Pittsburgh, etc., R. Co. v. Hosea, supra*; *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, 67 N. E. 923; *Couchman v. Prather* (1904), 162 Ind. 250, 70 N. E. 240; *Elliott v. Brazil Block Coal Co.* (1900), 25 Ind. App. 592, 58 N. E. 736; *Fabel v. Cleveland, etc.,*



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*R. Co.* (1903), 30 Ind. App. 268, 65 N. E. 929; *Baltimore, etc., R. Co. v. Gillard* (1904), 34 Ind. App. 339, 71 N. E. 58; *Smith, Admx., v. Cleveland, etc., R. Co.* (1918), 67 Ind. App. 397, 117 N. E. 534.

It is apparent from the complaint that counsel for appellants were of the opinion that the children derived a right to maintain this action from §8355

4. Burns 1908, §5323 R. S. 1881, which has been omitted from Burns' Revision of 1914. This is §20 of the former license law—the act of March 17, 1875—and is in the following language: "Section 20. Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the Auditor's office, as required by section four of this act (§5315), to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." §5323 R. S. 1881.

Appellee earnestly insists that said §20 was repealed by the act of March 4, 1911, entitled "An Act Concerning Intoxicating Liquors." Acts 1911 p. 244, ch. 119, §8323d *et seq.* Burns 1914. In support of that contention appellee cites *McHale v. Board, etc.* (1913), 180 Ind. 390, 103 N. E. 321. But in view of the conclusion we have reached on the other features of the case we need not discuss that question.

It has been held that any person who has been damaged by the violation of any of the provisions of the act referred to in said §20 should bring his action directly and in his own name, and not indirectly through the medium of an administrator, and also

that, where the action is on the bond, it is properly brought in the name of the State of Indiana on the relation of the person who has been so damaged. *Wall v. State, ex rel.* (1894), 10 Ind. App. 530, 38 N. E. 190.

In conferring a right of action on persons injured or damaged in their "means of support," what was the real legislative intent? To discover that intent we must look to the principles of the common law and to the statutes of this state, if any, bearing upon the subject. At common law the husband is the head of the family. He has the right to the custody and control of the children, except in cases of misconduct or where the welfare of the child demands that such custody be taken from him and given to the mother; and generally his authority and dominion over the children is exclusive as between him and the mother. The duty to support his wife and children is imposed by the common law on the husband. As between father and mother, the primary liability for the support of the children is imposed on the father. In this state statutes have been enacted making it a criminal offense for a husband, without good cause, to abandon and fail to support his wife or child. §2635 Burns 1914, Acts 1913 p. 956. At common law the husband is entitled to the services of the wife and consequently to her earnings. Even under modern statutes enlarging the rights of married women, it is held to be the duty of the wife, without compensation, to attend to all the ordinary household duties and to labor faithfully in these matters to advance her husband's interests. 13 R. C. L. 983 *et seq.*; 29 Cyc 1606; *Liebold v. Liebold* (1902), 158 Ind. 60, 62 N. E. 627; *Nelson v. Spaulding* (1894), 11 Ind. App. 453, 39 N. E. 168; *Hensley v. Tuttle* (1897), 17 Ind. App. 253, 46 N. E.

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594; *Scott v. Carothers* (1897), 17 Ind. App. 673, 47 N. E. 389; *Robinson v. Foust* (1903), 31 Ind. App. 384, 68 N. E. 182, 99 Am. St. 269.

Charles R. Drury, his wife, and their children, lived together as members of a common family up to the time of the death of the wife, and at said time he was fulfilling all the legal obligations resting upon him as the head of the household. Therefore the status of the Drury family was that of the common law. In the legal sense the services rendered by the wife, including all the services in the way of care bestowed upon the children, inured to the benefit of the husband. Had he brought an action in his own right against Weigand—or, if maintainable, against Krogman—the measure of his damages would have included the identical elements for which the children are seeking to recover in the case at bar. *Indianapolis, etc., Transit Co. v. Reeder* (1908), 42 Ind. App. 520, 85 N. E. 1042. In contemplation of law appellants are wholly dependent on their father, and in no lawful sense can they be regarded as dependents of their deceased mother. The duty of the father to support his minor children is a continuing one, and, on the death of the mother, the obligation rested upon him to provide in some other manner for the children such services in the way of care and attention as the mother rendered in her lifetime. It follows that under the facts in this case appellants were not injured or damaged in their means of support within the meaning of the statute under consideration. The rule that no one other than the person or persons designated in the statute can maintain an action for the death of a human being by wrongful act is rigidly enforced. 8 R. C. L. 761 *et seq.* Therefore we must and do hold

that appellants cannot maintain this action under §20, *supra*.

Whether this section ever was applicable to any person other than a saloonkeeper licensed under the act of March 17, 1875, *supra*, or under said act as from time to time amended, we need not decide.

No statute authorizing appellants to maintain this action has been pointed out to us, and we know of none. The trial court did not err in overruling the motion for a new trial. The conclusion we have reached makes it unnecessary to consider the ruling on the demurrer to the complaint.

Judgment affirmed.

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CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. PARTLOW.

[No. 9,813. Filed June 24, 1919.]

1. **APPEAL.—Review.—Ruling on Motion to Strike Out.**—The court on appeal will sustain the ruling of the trial court in refusing to strike out defendant's so-called set-off, if the pleading is a proper one as a counterclaim, regardless of the fact that the pleader termed it a set-off. p. 619.
2. **SET-OFF AND COUNTERCLAIM.—Counterclaim.—Right to Plead.—Action for Demurrage.**—In view of §353 Burns 1914, §348 R. S. 1881, defining a set-off, and §355 Burns 1914, §350 R. S. 1881, declaring a counterclaim to be any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce plaintiff's claim, and §356 Burns 1914, §351 R. S. 1881, providing that if any defendant omit to set up a counterclaim arising out of the contract or transaction involved, he cannot afterwards maintain an action therefor, except at his own costs, a claim for damages by the consignee of coal cars for failure of a railroad company to transport them at the speed required by §5205 Burns 1914, Acts 1907 p. 434, though termed a set-off by the

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pleader, was in fact a counterclaim which could properly be set up by the consignee in an action against him by the company for demurrage charges, where the cars named in such claim were among those on which demurrage was claimed, so that the respective claims of the parties arose out of the same transaction. p. 619.

3. **PLEADING.—Demurrer to Set-Off or Counterclaim.—Form.—Sufficiency.**—A demurrer to a set-off or counterclaim for insufficient facts should be in the same form as a demurrer to a complaint, which, under §344 Burns 1914, Acts 1911 p. 415, is that the pleading does not state facts sufficient to constitute a cause of action, so that a demurrer on the ground "that said set-off does not state facts sufficient to constitute a cause of action by way of set-off," is insufficient to challenge a pleading which, though termed a set-off by the pleader, set up a cause of action as a counterclaim. p. 622.
4. **PLEADING.—Determining Sufficiency.**—In determining the sufficiency of a pleading, the court will be controlled by its substance, rather than by its formal parts, or by the name given it by the pleader. p. 622.
5. **CARRIERS.—Carriage of Goods.—Consignees.—Reconsignment.—Damages for Delay in Transporting.—Right to Sue.—Statute.**—A consignee of goods may reconsign the same in transit, and where a carrier acceded to the written request of the original consignee to reconsign and forward a shipment of coal to another, the latter must be deemed the consignee and entitled to recover whatever may have accrued, while he was the consignee, for the carrier's failure to transport the coal at the speed required by §5205 Burns 1914, Acts 1907 p. 434. pp. 622, 623.
6. **CARRIERS.—Carriage of Goods.—Title.—Presumption.**—In the absence of evidence to the contrary, it will be presumed that the title to a shipment of goods is in the consignee. p. 623.
7. **APPEAL.—Review.—Findings.—Conclusiveness.**—A finding by the trial court is conclusive on appeal where there is evidence to support it. p. 624.

From Marion Superior Court (102,764); *W. W. Thornton*, Judge.

Action by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company against John L. Partlow, doing business as the J. L. Partlow Coal Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

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Cleveland, etc., R. Co. v. Partlow—70 Ind. App. 616.

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*Frank L. Littleton, Charles P. Stewart and Forrest Chenowith, for appellant.*

*Born, Ritchey & Cronk, for appellee.*

BATMAN, C. J.—Appellant filed a complaint before a justice of the peace to recover of appellee the sum of \$77 on account of demurrage charges arising out of the alleged detention and use of thirty-two cars delivered to appellee on its private sidetrack at Indianapolis, Indiana, beyond the free time allowed consignees, by rules on file with the Public Service Commission of Indiana for loading and unloading cars. An exhibit accompanied this complaint as a part thereof, which gave the initials and numbers of the cars in question, with the dates of their delivery to appellee, and the dates of their release by him. Before such justice of the peace appellee filed an answer in general denial and what he termed a set-off. In the latter he alleged in substance, among other things, that he had purchased large quantities of coal in car-load lots in Indiana, which had been delivered to appellant at Terrè Haute for the purpose of being transported to him at Indianapolis, a distance of seventy-two miles; that nine of said cars, while in the possession of appellant, were withheld by it in transportation for an unreasonable length of time; that by §5205 Burns 1914, Acts 1907 p. 434, appellant was required to transport said cars of coal at a rate of speed equal to fifty miles each twenty-four hours, with an additional twenty-four hours at point of origin and junction points to perform necessary switching; that said cars ordered by, and shipped to, appellee were not shipped at the rate of speed required by said statute; that appellee was the owner of the coal contained in said cars, and was the consignee thereof. An exhibit

accompanied the alleged set-off as a part thereof, which gave the initials and numbers of the cars, the dates of shipment, and the dates of their delivery at Indianapolis. After the justice of the peace had sustained a demurrer to the alleged set-off, he heard the evidence and rendered a judgment in favor of appellant for \$77 and costs. From this judgment appellee appealed to the Marion Superior Court, where appellant filed a motion to strike out the alleged set-off of appellee, which was overruled. Appellant's demurrer thereto sustained by the justice of the peace was then overruled. The cause was afterwards submitted to the court for trial, which resulted in a judgment in favor of appellee for \$33 and costs. Appellant filed a motion for a new trial, which was overruled, and now prosecutes this appeal.

Appellant contends that the court erred in overruling its motion to strike out appellee's alleged set-off. It bases this contention on the ground that

1. a set-off "must consist of matters arising out of debt, duty, or contract," as provided in §353 Burns 1914, §348 R. S. 1881, and that any liability which may have accrued to appellee under §5205, *supra*, did not arise out of any such obligation. It is our duty to sustain the ruling of the trial court, if the pleading in question is a proper one, regardless of what the pleader may have called it. *Mills v. Rosenbaum* (1885), 103 Ind. 152, 2 N. E. 313. The
2. statute defines a counterclaim to be "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim \* \* \* for damages." §355 Burns 1914, §350 R. S. 1881. It is also provided that:

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“If any defendant personally served with notice omit to set up a counterclaim arising out of the contract, or transaction set forth in the complaint as the ground of the plaintiff’s claims, or any of them, he cannot afterward maintain an action against the plaintiff therefor, except at his own costs.” §356 Burns 1914, §351 R. S. 1881. It has been held that these two sections should be construed together in determining what matters may be pleaded by way of counterclaim, and that the word “transaction” should be construed as meaning something different from, and additional to, the preceding word “contract” to which it is joined by the disjunctive “or”; that a transaction is not confined to what is done in one day or at a single time and place, but the logical relation of the facts involved determines whether they together constitute a single transaction. *Excelsior Clay Works v. De-Camp* (1907), 40 Ind. App. 26, 80 N. E. 981. The Supreme Court of this state has said: “A counterclaim is that which might have arisen out of, or could have had some connection with the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or noncompliance with its provisions.” *Conner v. Winton* (1856), 7 Ind. 523. This definition has been quoted with approval in the later cases of *Standley v. Northwestern, etc., Ins. Co.* (1884), 95 Ind. 254, and *Blue v. Capital Nat. Bank* (1896), 145 Ind. 518, 43 N. E. 655. It has also been more recently approved by the Supreme Court of Oregon, in a decision in which the case of *Conner v. Winton*, *supra*, was cited. *Krausse v. Greenfield* (1912), 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B



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115. A comparison of the exhibits filed with the complaint and the pleading under consideration discloses that the nine cars named in the alleged set-off are among the thirty-two cars on which demurrage charges are claimed, and involved the same shipments. It thus becomes apparent that the respective claims of appellant and appellee arise out of the same transactions. It is alleged that appellee was the owner of the coal shipped in said cars and the consignee thereof. The contracts of shipment therefore were made for his benefit, and he thereby became a party to such transactions. 4 R. C. L. 94; *Tebbs v. Cleveland, etc., R. Co.* (1898), 20 Ind. App. 192, 50 N. E. 486. It must be assumed that the parties thereto knew of the existence of the rules with reference to demurrage charges, and therefore knew that such charges would accrue against appellee in favor of appellant, if there was delay in unloading such cars beyond the free time allowed for that purpose. They must be held to have known of the existence of §5205, *supra*, and that a liability might accrue in favor of appellee against appellant in case the shipments were not made at the rate of speed therein provided. Thus the liability which each is claiming against the other clearly arises out of the original transactions, and are such that the parties must have intended, at the time the contracts of shipment were made, might, in some event, give one party a claim against the other by reason of the existence of said rule and statute. *Miller v. Mansfield* (1873), 112 Mass. 260. We therefore conclude that the alleged set-off is in fact a counterclaim, and that the court did not err in overruling appellant's motion to strike it out.

Appellant also contends that the court erred in overruling its demurrer to appellee's cross-action.

which was denominated a set-off. We observe

3. that the ground for demurrer as stated therein is as follows: "That said setoff does not state facts sufficient to constitute a cause of action *by way of setoff*." (Our italics.) It has been repeatedly held that a demurrer to a set-off or counterclaim should be in the same form as a demurrer to a complaint. *Duffy v. England* (1911), 176 Ind. 575, 96 N. E. 704. The statutory form for a demurrer to a complaint for insufficient facts is that it does not state facts sufficient to constitute a cause of action. §344 Burns 1914, Acts 1911 p. 415. Appellant in the preparation of his demurrer was not content to attack the pleading generally, as not stating facts sufficient to constitute a cause of action, but expressly limited the same to the defects therein as a set-off, thereby leaving it unchallenged as a cross-complaint or a counterclaim. The fact that appellee designated such pleading as a set-off cannot affect the situation, as the court,

4. in determining the sufficiency of a pleading, will be controlled by its substance rather than by its formal parts, or by the name which has been given it by the pleader. *Drebing v. Zahrt* (1914), 55 Ind. App. 492, 104 N. E. 46. In view of the fact that we have held that the pleading under consideration contains facts sufficient to constitute a cause of action as a counterclaim, it is unnecessary to give further consideration to the action of the court in overruling a demurrer thereto as a set-off.

Appellant contends that the decision of the court is not sustained by sufficient evidence and is contrary to law. In support of this contention it as-

5. serts, among other things, that §5205 Burns 1914, *supra*, only gives a right of action for

delay in the shipment of freight to the consignee thereof; that the evidence fails to show that appellee was the consignee of the coal in question, when the alleged delay occurred, and hence one of the essential elements of appellee's right of recovery is absent. An examination of the record discloses evidence which tends to show that the nine cars of coal described in the exhibit filed with appellee's counterclaim were originally consigned to the Power Coal Company at the mines from which they were shipped. There

being no evidence to the contrary, the presumption prevails that the title to such coal thereby

6. vested in said consignee. *Pennsylvania Co. v. Holderman* (1879), 69 Ind. 18; *Cleveland, etc.,*

5. *R. Co. v. Moline Plow Co.* (1895), 13 Ind. App. 225, 41 N. E. 480; *Butler v. Pittsburgh, etc., R.*

*Co.* (1897), 18 Ind. App. 656, 46 N. E. 92; *McNeely & Co. v. Lake Shore, etc., R. Co.* (1917), 64 Ind. App. 363, 115 N. E. 954. Under these circumstances the Power Coal Company, as such consignee, had the right to reconsign such coal in transit. *Tebbs v. Cleveland, etc., R. Co., supra.* The evidence tends to show that, in pursuance of such right, said company, on or before the days on which the cars of coal in question were received by appellant at Terre Haute from its connecting line, made written requests of appellant to reconsign and forward said coal to appellee at Indianapolis, and to show said company as consignor in the billing; that appellant received and accepted such written requests, and, in pursuance thereof, transported said cars of coal from Terre Haute to Indianapolis, and delivered the same to appellee. The effect of such written requests, when accepted by appellant, was to create new contracts of

shipment in which the original consignee became the consignor, and appellee became the consignee. There is evidence which tends to show that this new contract was in effect during the entire time the coal was in transit on appellant's line of road where it is alleged the delay occurred. Hence appellee, as the new consignee of said coal, would be entitled to recover whatever may have accrued under the provisions of §5205, *supra*, by reason of such delay.

It is also contended that the evidence does not show what shipping instructions, if any, were given appellant for the transportation of said coal, or that appellee was named as consignee therein. An examination of the written requests for the reconsignment of said coal, which the evidence tends to show were received, accepted and acted upon by appellant, disclose instructions for its shipment to appellee at Indianapolis, Indiana. Appellant's contention, therefore, is not well taken. It is further contended that the number of hours the coal was in transit is not shown, but we are of the opinion that the evidence furnished sufficient data in that regard to sustain the decision of the court as to the amount found due appellee by reason of the alleged delay in shipment.

Appellant asserts that appellee was not entitled to recover anything on account of the alleged delay in shipment, because any such delay was due

7. to his own fault in failing to pay the freight charges. The trial court found to the contrary, and, as the evidence tends to sustain such finding, we are bound thereby. Appellant finally contends that the court erred in rendering judgment in favor of appellee on the alleged set-off. It bases this contention on grounds which are not applicable

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to a cross-action by way of counterclaim, and hence there is no necessity for giving it consideration.

We find no error in the record. Judgment affirmed.

Nichols, P. J., Dausman, McMahan and Remy, JJ., concur. Enloe, J., not participating.

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BREHM v. HENNINGS.

[No. 9,939. Filed June 24, 1919.]

1. **NEW TRIAL.—Motion.—Time for Filing.**—Where a verdict was returned on April 22 and a motion for a *ventre de novo*, which was filed May 2, was overruled on June 6, a motion for new trial filed June 27 was properly overruled, since it was not filed within the time fixed by statute (§587 Burns 1914, Acts 1913 p. 848). p. 627.
2. **APPEAL.—Briefs.—Sufficiency.—Questions Presented.**—Where the first four propositions in appellant's brief under the heading "Points and Authorities" are so worded and grouped that the court can readily understand that they all relate to the assignment of errors relative to the overruling of the motion for a *ventre de novo*, held that such propositions are sufficient to require the court on appeal to pass upon that question. p. 627.
3. **COURTS.—Opinions.—Construction.**—Statements made by a court in an opinion should be considered in the light of the record then under consideration. p. 630.
4. **TRIAL.—Ventre De Novo.—General Verdict.—Failure to Find On All Issues.**—In an action by a landlord against a former tenant, where two paragraphs of complaint sought to recover damages for failure to restore the property to the condition it was in when the lease was executed, and the remaining paragraphs were for damages for holding over after the expiration of the lease, and the jury returned a verdict, "We, the jury, find for the plaintiff upon the first paragraph of complaint and assess his damages at \$1.00," plaintiff's motion for a *ventre de novo* should have been sustained, since the verdict was general and the jury failed to find upon all the issues. p. 637.

From Madison Superior Court; Willis S. Ellis,  
Judge.

Action by Philip Brehm against Joseph E. Hennings. From the judgment rendered, the plaintiff appeals. *Reversed.*

*Frank B. Foster* and *Byron McMahon*, for appellant.

*Philip B. O'Neill* and *Frederick Van Nuys*, for appellee.

McMAHAN, J.—The appellant brought this action against the appellee to recover damages for an alleged breach of contract in failing to restore leased property at the expiration of the lease to the condition it was in at the time the lease was executed, and for a wrongful holding of the leased premises beyond the time for which they were leased.

The complaint was in four paragraphs. The first and second paragraphs sought to recover damages for the failure to restore the property to the condition it was in when the lease was executed, the third and fourth paragraphs were for damages for holding over after the expiration of the lease. An answer of general denial being filed, the cause was tried by a jury, and a general verdict was returned, which, omitting the caption and signature, is as follows: "We, the jury, find for the plaintiff upon the first paragraph of complaint and assess his damages at \$1.00." This verdict was returned April 22, and on May 2 appellant filed a motion for a *venire de novo* on the ground that the verdict was incomplete, and that no verdict was returned as to the second, third and fourth paragraphs of complaint. This motion was overruled on June 6, and on June 27 appellant filed a motion for a new trial, which was also overruled.

The errors assigned are that the court erred: (1)

In overruling the motion for a *venire de novo*; and  
(2) in overruling the motion for a new trial.

1. There was no error in overruling the motion for a new trial, as it was not filed within the time fixed by statute.

Appellant contends that his motion for a *venire de novo* should have been sustained because the jury found only upon one paragraph of complaint and ignored the other three paragraphs.

Appellee insists that no question is presented on account of the failure of appellant to comply with the rules of this court in the preparation of his

2. brief. The first four propositions in appellant's brief under the heading "Points and Authorities" are so worded and grouped that we can readily understand that they all relate to the assignment of errors relative to the overruling of the motion for a *venire de novo*, and are sufficient to require us to pass upon that question.

Appellee also insists that a verdict for the plaintiff on one of several paragraphs of complaint, without noticing the other paragraphs, is equivalent to a finding against the plaintiff on such other paragraphs.

There is some confusion among the decisions in this state concerning the office of a *venire de novo*, the result of a careless use of language in making general statements concerning a *venire de novo* and a failure to make any distinction between general and special verdicts.

For many years the rule of the common law, as stated in 2 Tidds, Prac. 992, and affirmed and followed in *Bosseker v. Cramer* (1862), 18 Ind. 44, and affirmed in many later cases, was the recognized rule in this state relative to the office of a *venire de novo*. The

rule, as there stated, is this: "A *venire do novo* is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages."

This rule remained unchanged until 1879, when the Supreme Court, in *Graham v. State, ex rel.*, 66 Ind. 386, after having its attention called to our practice Code, held that the failure of the court to find upon all the issues in a special verdict was no cause for a *venire de novo*, if such verdict had substance enough to form the basis of a judgment for either party. The court, on page 395, said: "The special verdict or finding is confined to the facts proved. \* \* \*, the issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies. \* \* \* And if the facts proved and found do not determine some of the issues, those issues must be regarded as not proved by the party having the burden of proof resting upon him."

In *Glantz v. City of South Bend* (1886), 106 Ind. 305, 6 N. E. 632, where the court was again discussing the effect of a special verdict in which all the issues were not passed upon, the *Graham* case was approved, the court saying: "Approving and following, as we think we must, the more recent rule of practice in relation to special verdicts, we must hold in the case under consideration, that the trial court did not err in overruling appellant's motion for a *venire de novo*. \* \* \* The burden was on her to establish this fact (want of care) by a fair preponderance of the evidence, and as the special verdict is entirely silent as to this fact, in the absence of the evidence, we would



be bound to conclude that she had failed to prove such fact. In determining whether or not it was error to overrule the motion for a *venire de novo*, we cannot look to the evidence, where it is in the record.”

In *Bartley v. Phillips* (1888), 114 Ind. 189, 16 N. E. 508, where the facts were found specially, the Supreme Court, in sustaining the action of the trial court in overruling the motion for a *venire de novo*, said: “That the court failed to find and state in its special findings any fact that may have been proven, or failed to find and state therein the force and effect of a certain clause in the mortgage, are questions not properly raised by a motion for a *venire de novo*. If all the facts were not found, or if facts are stated in the special findings of facts which the proof did not warrant, the remedy, and the only remedy, was by a motion for a new trial.”

In *Board, etc. v. Pearson* (1889), 120 Ind. 426, 22 N. E. 134, 16 Am. St. 325, the court said: “There is no imperfection in the verdict, for sufficient facts are stated to enable the court to pronounce judgment, and, under the rule which prevails in this State, the failure to find upon all the issues does not entitle a party to a *venire de novo*. *Wilson v. Hamilton*, 75 Ind. 71; *Jones v. Baird*, 76 Ind. 164; *Glantz v. City of South Bend*, 106 Ind. 305; 1 Works Pr., section 971, and cases cited, n. This has been the rule since the decision in *Graham v. State, ex rel.*, 66 Ind. 386, although the earlier cases declared a different rule. *Quill v. Gallivan*, 108 Ind. 235, and cases cited; *Bartley v. Phillips*, 114 Ind. 189; *Indiana, etc., R. W. Co. v. Finnell*, 116 Ind. 414. In the case of *Glantz v. City of South Bend, supra*, the court referred to *Bosseker v. Cramer*, 18 Ind. 44, and some other cases, and, after

showing that the doctrine of those cases had been denied in *Graham v. State, ex rel., supra*, and that the later cases approved the doctrine of that case, declared in effect that the rule as stated in *Graham v. State, ex rel., supra*, must be considered as established. The effect of the decisions has been to overrule *Bosseker v. Cramer, supra*, although the express statement that it was overruled has probably not been made. We feel bound to adhere to what has so long been the rule, and to hold, as has been so often held in recent cases, that where the verdict is perfect on its face, and so fully finds the facts as to enable the court to pronounce judgment upon it, a motion for a *venire de novo* will be denied, although the verdict may not find upon all of the issues."

This statement of the court is broad and sweeping in its effect, but we think it should be considered in the light of the record then under considera-

3. tion. The opinion in this case does not disclose whether the verdict was general or special, but on an examination of the record we find there was a special verdict, so that what the court said in relation to *Bosseker v. Cramer, supra*, being overruled, should be understood as referring only to special verdicts.

In *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189, 45 N. E. 64, the appellee's complaint was in two paragraphs to recover a statutory penalty for failure and refusal on the part of appellant to supply appellee with telephone facilities without discrimination or partiality. The case was tried by a jury, which returned the following verdict: "'We, the jury, find for the plaintiff and assess his damages at \$100.00.''" The statute provided a penalty of \$100 for each violation. Both paragraphs were the same, except the

offense was alleged as on different days. Appellant contended that, the jury having assessed the appellee's damages at \$100, it was evident that the jury had only found for appellee on one paragraph of complaint, and that the verdict was defective because it did not cover all the issues. The court held that, if there was any error in not assessing the damages at \$200, it was in appellant's favor, and that it was in no position to complain. In referring to the motion for a *venire de novo*, the court, on page 193, said: "The rule in this State is that a motion for *venire de novo* will not be sustained unless the verdict, whether general or special, is so defective and uncertain upon its face that no judgment can be rendered upon it. *Bartley v. Phillips*, 114 Ind. 189, and cases cited on p. 192; *Board, etc. v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325.

"A verdict, however informal, is good if the court can understand it. *Daniels v. McGinnis, Admr.*, 97 Ind. 549. The verdict in this case is not informal or defective, even if appellant's contention, that it only finds for appellee upon one paragraph is correct, for the reason that a finding in favor of appellee upon one paragraph of his complaint, without noticing the other, would be equivalent to a finding against him on such other paragraph. *Shaw v. Barnhart*, 17 Ind. 183."

The Shaw case, however, cannot be held to be authority on the point to which it is cited, as the court expressly stated that it did not decide the question. In *Bartley v. Phillips, supra*, there was a special finding of facts, and in *Board, etc. v. Pearson, supra*, there was a special verdict, and neither of them supports the statement relative to a general verdict.

In *Pennsylvania Co. v. Reesor* (1916), 60 Ind. App. 636, 108 N. E. 983, the cause was tried on two paragraphs of complaint, the third and fourth, the third charging wilful killing, while the fourth charged negligence. The jury returned a general verdict for appellee on the fourth paragraph of complaint, and answered a number of interrogatories. The verdict was silent as to the third paragraph. The appellant filed a motion for judgment on the interrogatories. The jury, in answer to the interrogatories, found that there was a wilful killing. Appellant insisted that the general verdict, being based on the fourth paragraph, in which it was alleged that the killing was brought about by negligence, was equivalent to a finding against appellee on the third paragraph of complaint, which charged wilfulness, and that the answers to the interrogatories were antagonistic and incapable of being reconciled with the general verdict. The court, in passing upon this question, said: "The trial court submitted forms of verdict to the jury, which returned a general verdict, finding for appellee on his fourth paragraph of complaint. No objection is presented as to the form of the verdict. It is correctly argued by appellant that this finding of the jury was in effect a finding against appellee on the third paragraph of complaint. This is fully sustained by the following authorities. *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189, 193, 45 N. E. 54; *Union Central Life Ins. Co. v. Huyck* (1892), 5 Ind. App. 474, 32 N. E. 580."

In *Adams v. Main* (1891), 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266, the jury returned a verdict in favor of plaintiff, appellee, on the second paragraph of complaint, nothing being said about the first para-

graph. The court, in discussing the question, said: "The appellant insists that his motion for a *venire de novo* should have been sustained because the jury found only upon one paragraph of the complaint, ignoring the other. It was formerly held that a failure to find upon all the issues was a good cause for a *venire de novo*, but the later cases decide that if the verdict does not cover all the issues this is not a defect appearing on the face. *Works Pr.*, 971; *Board, etc. v. Pearson*, 120 Ind. 426; *Alexandria, etc., Co. v. Painter*, 1 Ind. App. 587. The appellant should have moved to require the jury to perfect their verdict if he desired the finding to cover both paragraphs. He was not harmed, however, by the form of the verdict. The finding of the jury upon one paragraph of the complaint, where there is evidence tending to support both, precluded the appellee from ever bringing another action against the appellant on the cause averred in the paragraph as to which no finding was made. *Shaw v. Barnhart*, 17 Ind. 183. The cases cited by appellant on this point proceed upon the theory that a *venire de novo* will be granted where the jury fails to find upon all the issues, but this doctrine, as we have seen, has been overturned by the more recent decisions."

In *Alexandria Mining, etc., Co. v. Painter* (1891), 1 Ind. App. 587, 28 N. E. 113, the jury returned a general verdict against one of several defendants, no verdict being returned as to the other defendants. The court there said: "The omission to find in favor of or against the other defendants is not a ground for a *venire de novo*. Such a motion will not be sustained simply because there was an omission to find upon some of the issues. *Board v. Pearson* (*supra*)."

Many other cases might be cited wherein the courts failed to make any distinction between general and special verdicts, incorrectly stating that the rule in the Graham case applied to general verdicts as well as to special verdicts.

The Supreme Court, in *Maxwell v. Wright* (1903), 160 Ind. 515, 67 N. E. 267, in reviewing the cases and applying the law relative to a *venire de novo* to a general verdict, said: "The reasons that called for a modification of the old rule as to special verdicts and findings do not apply to general verdicts. In the former it is not the province of the jury to determine which party shall prevail in the action. That is left to the court; while in the general verdict the jury is required, under the instructions of the court as to the law of the case, to find generally from the facts proved and unproved, whether the plaintiff or defendant has succeeded on the issues made by the pleadings. Hence, when the jury fails to find for the plaintiff or defendant on an issue between the parties, it is apparent from the verdict that the jury has stopped short of a full determination of the case, and the verdict is therefore ill and defective, and subject to a *venire de novo*," citing with approval *Bosseker v. Cramer*, *supra*. (Our italics.)

In order to appreciate the full force and effect of the Maxwell case it is necessary to have the history of that case in mind. The case was appealed to this court, where the action of the trial court was affirmed, and, in the course of its opinion, this court said: "The principal contention of counsel for appellant is that the court erred in overruling appellant's motion for a *venire de novo* as to the appellee Henry Wright. Counsel say in their brief, 'The motion for a *venire*

de novo was based upon the failure of the jury to find on all the issues made.' In support of this the cases of *Bosseker v. Cramer*, 18 Ind. 44, and *Whitworth v. Ballard*, 56 Ind. 279, and cases cited, are relied upon to sustain the proposition. The cases cited and other cases following them sustain the appellant's position, but it appears that the supreme court in later cases overruled the doctrine announced in *Bosseker v. Cramer*, *supra*, by implication, and in still later cases expressly overruled the last-named case. In *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325, the supreme court, by Elliott, C. J., reviewed the cases in this state upon this point, and expressly overruled the case of *Bosseker v. Cramer*, *supra*, and squarely held that the motion for a *venire de novo* must be denied, although the verdict does not find upon all the issues. See, also *Zimmerman v. Gaumer*, 152 Ind. 552, 53 N. E. 829; *Exploring Co. v. Painter*, 1 Ind. App. 587, 28 N. E. 113; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266. We think the rule announced in the later cases the better one, and it is certainly the only rule that could in good reason be adopted so long as the law remains that a *venire de novo* reaches matter of form only, and is effective only when the finding and verdict are so defective that no judgment can be rendered. In the case at bar the verdict is not defective in matter of form." *Maxwell v. Wright* (1902), 64 N. E. 893.

The cause was transferred to the Supreme Court on the ground that the opinion of the Appellate Court as quoted contravened a ruling precedent of the Supreme Court, and the cause was reversed, the court, after quoting 1 Graham and Waterman, *New Trials* 40, as follows: " 'If the jury find only a part of the

issues, judgment cannot be entered on the verdict. It is void for the whole, and a *venire de novo* will be awarded' ” said: “While there is no real conflict among our many cases upon this subject, there is apparently some confusion, manifestly the result of a careless use of language employed in making general statements concerning the office of a *venire de novo*. In all the cases we have examined, decided since the cases of *Graham v. State, ex rel.*, 66 Ind. 386, which rests upon a special verdict, or special finding, this case has been uniformly followed in all decisions involving a special verdict or special finding—and in effect holding, that if the special verdict or finding leaves some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof—and, if such verdict or finding contains substance enough to support a judgment one way or the other, it will not be objectionable because it does not pass upon all the issues, and the remedy for mistakes and errors not appearing upon the face of the verdict or finding is by motion for a new trial, and not by a *venire de novo*. \* \* \* (Citing several cases.)

“And in all cases since the *Graham* case, brought to our attention, involving a general verdict or finding which showed upon its face that less than the whole issue was covered, or was so ambiguous and uncertain as to afford no foundation for a judgment, a *venire de novo* has been held to be the proper remedy. \* \* \* (Citing several cases.)

“So it must be held that the rule springing from *Graham v. State, ex rel.*, *supra*, which must now be considered as firmly established in this State, modifies the common-law rule with respect to the writ of



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*venire de novo*, only in its application to special verdicts and special findings as ruled by our civil code.”

Thus it would appear that, while *Bosseker v. Cramer*, *supra*, has been overruled in so far as special verdicts are concerned, the common-law

4. rule with respect to the office of the writ of *venire de novo* as therein stated is still in force in this state in so far as general verdicts are concerned. The jury having failed to find upon all the issues, the motion for a *venire de novo* should have been sustained.

Judgment reversed, with direction for further proceedings not inconsistent herewith.

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MARYLAND CASUALTY COMPANY v. KNIGHT AND  
JILLSON COMPANY.

[No. 9,917. Filed June 25, 1919.]

INSURANCE.—*Employer's Liability Insurance*.—*Subrogation*.—*Action*.—*Complaint*.—*Sufficiency*.—Where an employer's liability company, after paying a judgment obtained against insured employer by an employe injured by the explosion of an alleged defective boiler tube, and the company which sold the tube to the employer on the theory of subrogation of the employer's right of action for breach of implied warranty, the complaint *held* insufficient for want of facts in that it failed to aver that the explosion of the tube resulted from its alleged defective construction.

From Marion Superior Court (93,947); *V. G. Clifford*, Judge.

Action by the Maryland Casualty Company against the Knight and Jillson Company. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

*James E. Rocap*, for appellant.

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*Gavin & Gavin*, for appellee.

ENLOE, J.—This was an action by appellant against appellee to recover damages for breach of an alleged implied contract of warranty.

The complaint, omitting formal parts, was, in so far as is material to the decision of the question involved in the appeal, as follows: "Plaintiff complains of the defendants and each of them and for a cause of action says that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and as such corporation is engaged in the State of Indiana in employers' liability insurance and has been so engaged for ten years continuously last past; that defendant Knight & Jillson Company is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and was during the year of 1907 and 1908 and is now engaged in the business of vending, jobbing, and selling hardware and boiler tubes and flues; that defendant Crane Company is a corporation of the State of Illinois and such corporation now has in its possession large amounts of the assets of said Knight & Jillson Company owned by the latter company in the years 1906, 1907, 1908, 1909, 1910, 1911, 1912 and 1913; that on or about June 27th, 1905, plaintiff entered into a certain written contract of employers' liability insurance with Kingan & Company, Ltd., a corporation organized and existing under and by virtue of the laws of Great Britain and Ireland which was then and continuously since then is engaged in carrying on a manufacturing business in Indianapolis, Marion County, Indiana, by which contract plaintiff agreed to insure the said Kingan & Company, Ltd., against loss from liability by reason of injuries

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to employees of said Kingan & Company and by reason of judgments in court by reason of such injuries; that on or about February 29, 1908, one William E. King who was then and there an employee of said Kingan & Company, Ltd., received personal injuries by reason of being scalded and burned by the explosion of one certain boiler tube installed in the plant of said Kingan & Company, Ltd., as a part of the boiler system thereof and thereafter the said King filed suit in said County and State against said Kingan & Company on the ground that he received said injuries by reason of the negligence of the latter company and thereafter on or about July 2nd, 1910, the said court entered judgment against said Kingan & Company for the sum of Seventy-five Hundred (\$7,500.00) dollars and costs upon the verdict in the same cause of action in favor of said William E. King against the said Kingan & Company, Ltd., that thereafter the defendant in such cause of action appealed such cause to the Supreme Court of said State of Indiana and on February 20, 1913, said judgment was in all things affirmed by the Supreme Court of Indiana; that thereafter by reason of said contract of insurance this plaintiff paid to and for the use of said Kingan & Company, Ltd., the sum of Five Thousand One Hundred forty-nine dollars and forty-five cents (\$5,149.45) such sum being the total amount due said Kingan & Company under the provisions of said policy and contract on account of the said Kingan & Company, Ltd., loss by reason of liability on account of said personal injuries to said William E. King, and plaintiff alleges that it was compelled to and obligated to make such payment of last-named sum to said Kingan & Company, Ltd., under the provisions of the said contract.

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And plaintiff alleges that by reason of such payment of the last-named sum that it is subrogated by operation of law to all the rights and choses in action of said Kingan & Company, Ltd., against defendants and each of them on account of said loss from liability, to the extent of (\$5,149.45) Five Thousand one hundred forty-nine dollars and forty-five cents; that on or about December, 1907, defendant Knight & Jillson Company sold and delivered said tube which exploded as aforesaid to Kingan & Company, Ltd., for the specific purpose of being used in the boiler of the latter company's plant, and plaintiff avers that then and there such tube was defective in this that said tube was improperly welded, weak, and infirm and had a weld of only one thirty-sixth ( $1/36$ th) more or less of an inch of a weld and plaintiff avers that the proper and safe dimensions of such weld should have been one-fourth ( $1/4$ ) of an inch more or less; that said defective condition of said tube was concealed from view and from sight by reason of the fact that such defective condition was on the inside of said tube and inside of such weld and completely covered and concealed from the view of said Kingan & Company and the latter company could not have discovered such defective condition without tearing open such tube, breaking and destroying the same; that said Kingan & Company relied upon defendant Knight & Jillson Company to furnish safe and fit tubes for the use of such boiler and relied upon the name and reputation of said Knight & Jillson Company for the furnishing of said safe and fit tubes for said boiler and defendant Knight & Jillson Company was then and there and at all times mentioned herein fully aware of such reliance and the said Knight & Jillson Com-

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pany at the time of the sale of said tubes and said defective tube impliedly warranted to the said Kingan & Company, Ltd., that said boiler tubes and said defective tube was and were free from defects and fit for the purpose intended for the same, namely, to serve as a part of the boiler system of said Kingan & Company, Ltd., in heating and furnishing power for its said plant; that defendant Knight & Jillson Company sold said defective tube to said Kingan & Company and delivered the same to the latter for the specific purpose of its use in such boiler, and then and there well knew of such intended purpose and use; that said defective tube was installed in said boiler by said Kingan & Company and was used and operated therein as a part of said boiler for a period of time of one week more or less and at the end of such period said defective tube burst and exploded and injured the said William E. King as aforesaid; that by reason of the sale to said Kingan & Company, Ltd., by said defendant Knight & Jillson Company of said defective tube and by reason of its explosion as aforesaid, plaintiff alleges that defendant Knight & Jillson Company breached said implied warranty by which plaintiff avers that defendant Knight & Jillson Company impliedly warranted to said Kingan & Company that said tube which exploded, was sound, and fit for the purpose intended as hereinbefore described and by reason of such breach plaintiff avers that said Kingan & Company was rendered liable for said loss from liability, and plaintiff lost and was compelled to pay the said sum of Five Thousand one hundred forty-nine dollars and twenty-five cents (\$5,149.25) \* \* \*."

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To this complaint appellee demurred for want of facts, with which demurrer it duly filed its memorandum of deficiencies. The demurrer was sustained, and, appellant refusing to further plead, judgment was rendered against it, that it take nothing by its complaint, and that appellee recover its costs. From this judgment this appeal is prosecuted, and the only question involved is the one as to the sufficiency of the complaint.

It will be noted that, while the complaint in question alleges a defect in construction of said "tube," it does not seek to recover the usual damages therefor. The damage sought to be recovered is special damage only.

Conceding, without deciding the same—for such decision is not necessary to the decision in this case, and we therefore do not decide the question—that upon proper complaint the present action will lie, yet it is so clear that appellant did not, and under the circumstances alleged it could not, have any greater right in the premises than the purchaser of said "tube," Kingan and Company had as to need no citation of authority. Appellant is seeking to be subrogated *to the alleged rights of Kingan and Company, and to recover thereon* against appellee. If Kingan and Company could not maintain this action, appellant cannot.

In the case at bar, what caused the explosion? For aught that is alleged in this complaint, it may have been the negligence of the engineer in allowing the water in the boiler to get too low, excessive steam pressure, failure of pump to work, etc.

It is not alleged that said "tube" exploded *as a result of defective construction*. The special damages

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claimed grow out of the said alleged explosion, and the complaint by its allegations not connecting said alleged defect and said explosion by proper averments was not good as against the demurrer interposed. Other insufficiencies of said complaint are urged, but they need not be noticed.

The judgment is affirmed.

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KING PIANO COMPANY v. BRANT.

[No. 9,925. Filed June 25, 1919.]

1. *APPEAL.—Term-Time Appeal.—Perfecting.—Bond.*—A term-time appeal will not be dismissed on appellee's motion on the ground that, on the overruling of appellant's motion for new trial, no time was fixed by the trial court in which to file an appeal bond, and no surety was named or indicated by the court at that time, where the record shows that, when the motion for new trial was overruled, appellant reserved an exception and prayed an appeal, which was granted, and that on a later day in the same term, the court approved and filed an appeal bond tendered by appellant. p. 644.
2. *APPEAL.—Review.—Verdict.—Conflicting Evidence.*—Where the evidence, although sharply conflicting, supports the jury's verdict, it will not be disturbed on appeal. p. 645.

From Marion Superior Court (102,074); *W. W. Thornton*, Judge.

Action by the King Piano Company against Carrie Brant. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*J. E. White* and *L. D. Claycombe*, for appellant.

*Wilson L. Doan* and *James C. Mathers*, for appellee.

*McMAHAN, J.*—This was an action in replevin brought by appellant to recover the possession of a

piano, alleged to be the property of appellant and unlawfully detained by appellee. There was an answer of general denial, a trial by jury, and a verdict for appellee.

Appellant filed a motion for a new trial, the only specifications not waived being that the verdict of the jury is (1) not sustained by sufficient evidence, and (2) contrary to law. The only assignment of error presenting any question for our consideration is the fourth, which is that the court erred in overruling appellant's motion for a new trial. This is a term-time appeal.

Appellee has filed a motion to dismiss the appeal, and says that, on the overruling of the motion for a new trial, no time was fixed by the trial court

1. in which to file an appeal bond, and that no surety was named or indicated by the court at that time. The record shows that, when the motion for a new trial was overruled, the appellant reserved an exception and prayed an appeal to this court, which was granted, and that on a later day in the same term the court approved and filed an appeal bond tendered by appellant. The bond, having been approved by the court and filed at the same term at which the motion for a new trial was overruled, is sufficient.

It is claimed by appellee that the first three assignments of errors are not proper assignments and present no question for our determination, but the fourth assignment, that the court erred in overruling the motion for a new trial, is properly assigned. Appellee, however, insists that appellant, in the preparation of its brief, has failed to apply specifically the points and propositions of law to any of the alleged errors, and that the action of the court in overruling the motion for a new trial is therefore waived. While



appellant's brief may not be a model to follow, there has been a good-faith effort made to comply with the rules of this court, and to group the points and authorities bearing on the action of the court in overruling the motion for a new trial. Where this has been done, we will determine an appeal on its merits. The motion to dismiss is overruled.

The appellant contends that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, and that the court erred in refusing to direct a verdict for appellant.

There was a sharp conflict in the evidence. Appellee purchased the piano in controversy from appellant on a contract which provided that the title

2. should remain in appellant until the full purchase price was paid. Appellant contended that appellee still owed a considerable part of the purchase price, while appellee contended that the purchase price had been paid in full, and that nothing was due and owing appellant. This was the only question in dispute between the parties. The evidence was conflicting on this question, and it was the province of the jury to weigh the evidence and to render such a verdict as in their judgment was proper under the evidence. There was evidence to support the verdict of the jury, and, such being the case, we cannot disturb their verdict. There is no ground for the contention that the verdict is contrary to law. The only objection which appellant actually makes is that the verdict is not supported by the evidence.

There was no error in the action of the court in refusing to direct a verdict for appellant. It would have been reversible error for the court to have done so.

Judgment affirmed.

## CHALMERS AND WILLIAMS v. SURPRISE, RECEIVER.

[No. 9,820. Filed June 25, 1919.]

1. **SALES.—Contract.—Construction.—Law Controlling.—Presumption.—Parol Evidence.—Amendment to Pleading.**—Where a contract for the sale of certain machinery by an Illinois manufacturer to an Indiana company f.o.b. Chicago provided that the contract should be deemed consummated in that city, but did not provide to whom or to what destination the machinery was to be shipped, a presumption arose that the contract was to be governed by the laws of Illinois, but such presumption was rebuttable by any evidence which did not contradict or vary the terms of the contract; hence, where the seller intervened in the buyer's receivership proceeding for the purpose of recovering the machinery, and subsequently filed its motion to amend its original petition so as to lay a proper foundation for the introduction of evidence to show the intention of the parties as to what law was to govern the contract, it was error for the trial court to deny the motion. pp. 653, 654.
2. **CONTRACTS.—Construction.—Law Controlling.—Intent of Parties.**—A contract is governed by the law with a view to which it is made, and when the intention of the parties in that regard is made to appear it will be given effect, except where they are actuated by fraud. p. 654.
3. **SALES.—Validity.—Conditional Sales.—Buyer's Insolvency.—Rights of General Creditors.—Execution Creditor.—Creditor.—Judgment Creditor.**—Under the law of Illinois that conditional sale contracts are void as to execution creditors of a vendee in possession of a chattel, the general creditors of an insolvent corporation are not execution creditors on the theory that the seizure by the receiver of machinery sold to the corporation under a conditional sale contract was in the nature of an equitable levy by the court, and fixed a lien thereon in favor of the general creditors; a creditor being one who has a legal right to damages or a debt capable of enforcement by judicial process, a judgment creditor being one whose claim has been merged into a judgment against his debtor, and an execution creditor being one who, having obtained a judgment, has caused execution to be issued thereon. pp. 655, 656.
4. **APPEAL.—Review.—Ruling on Demurrer.—Law of Foreign State.—Presumption.**—Where a seller intervened in an insolvent buyer's receivership proceedings to recover possession of certain machin-

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ery sold under a conditional contract of sale, it will be assumed, in reviewing the overruling of a demurrer to a paragraph of answer to intervenor's petition drawn on the theory that the sale contracts were governed by the laws of Illinois, that the common law as interpreted and applied in Indiana, prevails in that state, except as otherwise alleged. p. 655.

5. RECEIVERS.—*Title of Receiver.—Conditional Sales.—Bona Fide Purchaser.*—Under the law of Illinois that a conditional contract of sale of personalty is void as to *bona fide* purchasers and execution creditors of a vendee in possession of a chattel, the receiver of insolvent corporation buyer, its stockholders, or the creditors represented by the receiver, are not *bona fide* purchasers. p. 656.
6. APPEAL.—*Review.—Evidence.—Sufficiency.*—Where the vendor intervened in an insolvent buyer's receivership proceedings to recover certain machinery sold under a conditional contract sale, evidence held insufficient to sustain trial court's finding denying petitioners right of possession. p. 658.

From Lake Superior Court; *Walter T. Hardy*, Judge.

Intervening petition in receivership proceedings by Chalmers and Williams, a corporation, against Charles L. Surprise, receiver of the Midland Recoveries Company. From a judgment for the receiver, the petitioner appeals. *Reversed.*

*Tenney, Harding & Sherman* and *L. V. Cravens*, for appellant.

*Bomberger, Peters & Morthland*, for appellee.

BATMAN, C. J.—The record in this case discloses that the Midland Recoveries Company, a corporation, was engaged in business at Hammond, Indiana; that, having become insolvent, the appellee, Charles L. Surprise, was appointed a receiver thereof by the Lake Superior Court; that said receiver duly qualified and assumed the duties of his trust, by taking into his possession the assets of said company; that among said assets was certain machinery which appellant

claimed was its property, and, after making demand therefor, filed its intervening petition, in which it asked the court to require said receiver to deliver said machinery to it; that said petition alleged in substance, among other things, that it had theretofore entered into two separate contracts with the Midland Recoveries Company for the sale of certain machinery (describing it and naming the price thereof); that said machinery had been delivered to said company in accordance with the terms of said contracts; that each of said contracts contained the following provision:

“The title and right of possession to the machinery herein specified remains in the company until all payments hereunder (including deferred payments and any notes or renewals thereof, if any), shall have been made in cash, and it is agreed that said machinery shall remain the personal property of the company whatever may be the mode of its attachment to realty or otherwise, until fully paid for in cash. Upon failure to make payments, or any of them, as herein specified, the company may retain any and all partial payments which have been made, as liquidated damages, and shall be entitled to take immediate possession of said property, and be free to enter the premises where said machinery may be located, and to remove same as its property without prejudice to any further claims on account of damage which the company may suffer from any cause.”

It is further alleged that the title to said machinery always has been and still is in appellant. Copies

of said contracts were filed with said petition, and made parts thereof as exhibits. Each of said contracts is dated at Chicago Heights, Illinois, and is addressed to William Wilkie, Jr., Hammond, Indiana, who, it is alleged, was the agent of said company. They are each in the form of proposals by appellant, duly accepted by said company, in which it is provided that the former should furnish the latter certain machinery therein described, f. o. b. cars at point of shipment, Chicago Heights, Illinois. Each contains the provision quoted above, and, in addition thereto, the following:

“All the terms and provisions of the contract between the parties hereto are fully set out herein, and no agent, salesman or other party is authorized to bind the company by any agreement, warranty, statement, promise or understanding not herein expressed, and no modification of the contract shall be binding on either party unless the same are in writing, accepted by the purchaser and approved in writing by one of the company's executive officers, and it is expressly agreed and understood that there are no promises, agreements, or understandings, verbal or otherwise, outside of this contract. This proposal is made for immediate acceptance of the purchaser, and upon acceptance thereof the contract shall be deemed consummated at Chicago, Illinois, but only upon the written approval of an Executive Officer of the Company, and shall not be binding upon the company until so approved.”

Appellant filed its motion for leave to amend said petition by inserting the following: “That after the exe-

cution and consummation of said contract, the said Chalmers & Williams shipped said machinery from Chicago Heights, Illinois, to Midland Recoveries Company, at Osborn Station, Hammond, Indiana, and said machinery ever since said time has been located at the factory of said Midland Recoveries Company at Osborn, Indiana." This motion was overruled, and appellee filed an answer to said petition in two paragraphs. The first was a general denial, and the second alleged in substance, among other things, that he was duly appointed a receiver of said Midland Recoveries Company; that at the time of his appointment said company was insolvent, and that it was necessary, in order to preserve the assets thereof, that a receiver be appointed to take charge of the same, and to operate its plant; that in pursuance of his appointment, and an order of court, he went into possession of the assets of said company, took charge of its said plant, and proceeded to operate the same; that among the matters and things turned over to him by said company was the machinery described in appellant's said petition; that said company was and is indebted to various creditors in a sum approximating \$20,000; that he believes that credit was advanced by the various persons holding claims against said company upon the faith and strength that it owned its plant and equipment, of which the machinery described in said intervening petition formed a considerable part; that none of said creditors knew, or had reason to believe, that said company was not the owner thereof; that the contracts mentioned in the petition show on their face that they were executed at Chicago Heights, in the State of Illinois; that said machinery was delivered to said company at that place, and that

the contracts were to be performed within the State of Illinois, and not within the State of Indiana; that it is the law of the State of Illinois that:

“If a person agrees to sell to another a chattel on condition that the price should be paid within a certain time, retaining title in himself in the meantime, and delivers the chattel to the vendee, so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor. \* \* \* The party in possession of personal property is presumed to be the owner of it, possession being one of the strongest evidences of title to personal property. ‘To suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons.’ ”

It is further alleged in said paragraph of answer that said law was in force in the State of Illinois at the time of the execution of said contracts; that by reason of said rule of law the claim of the intervenor herein would be and is fraudulent and void, as against the creditors of said company. To this paragraph of answer appellant filed a demurrer, which was overruled, and thereupon it filed a reply thereto in two paragraphs. The first was a general denial, and the second alleged in substance, among other things, that the contracts in question were signed at Chicago Heights in the State of Illinois, in pursuance of invitations on the part of the Midland Recoveries Company to appellant to present to it proposals for the

installation of the machinery described in its intervening petition, which was to be constructed for, and delivered to, the plant of said company in that part of Hammond, Indiana, known as Osborn; that it was the intention of all the parties to said contract, at the time of signing the same, that said machinery was to be shipped to, and installed in, the factory of said company at Osborn, Indiana; that shipping directions were given by said company to appellant at the latter's office at Chicago Heights, Illinois; that said machinery should be shipped to Osborn, Indiana, and should be placed on the cars at said Chicago Heights by appellant for that purpose; that the railroad depot at said Chicago Heights was to be the point from which said shipments were to be made; that it was thoroughly understood and agreed to between the parties at the time of entering into said contracts that as soon as said machinery could be made ready for shipment, it was to be shipped out of the State of Illinois, and into the State of Indiana, and that the contracts themselves were to be performed within the State of Indiana; that at no time was it ever contemplated between the parties that said machinery should remain in the State of Illinois, or should be governed by the laws of said state; that at the time of entering into said contracts, at the time the shipments were made, at the time of delivering said machinery at Osborn, Indiana, and at the time of its installation in the plant of said company, the said company was not indebted to any of its present creditors; that as between said company and appellant said contracts were valid, even under the laws of the State of Illinois; that at the time said machinery was taken out of the State of Illinois the title to the same



under said contracts, as between the parties thereto, remained in appellant; that it was understood and agreed between the parties that said title was to continue and remain in appellant after the same had been taken into the State of Indiana; that all of the rights of the present creditors of said company, which have attached, did not attach until after the machinery had been installed in its plant at Osborn, Indiana. Appellant filed a demurrer to this paragraph of reply, which was sustained. A trial was had by the court, resulting in an allowance in favor of appellant for the amount found due it on said contracts as a general claim, to be paid by the receiver in the due course of the settlement of his trust, and a judgment that appellant is not entitled, and should not recover from the receiver, the property described in its intervening petition, but that the receiver should sell the same, as the property of said company, under a former order of the court. From this judgment appellant has appealed, and has assigned errors requiring a consideration of the questions hereinafter determined.

Appellant contends that the court erred in overruling its motion for leave to amend its intervening petition. The evident purpose of appellant in seeking to make the proposed amendment was to lay a proper foundation for the introduction of evidence, bearing on the question of what law the parties intended should govern the conditional sales contracts. The motion appears to be formal and timely, but appellee contends that said contracts are unambiguous; that they indicate by their terms the law by which they are to be construed, and hence extraneous proof in that regard was inadmissible; that, this being true, it was not error to overrule ap-

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pellant's motion, as a refusal to allow matter to be added to the petition by way of amendment, which could not be properly proved, was not an abuse of discretion. It may be stated as a principle of uni-

versal law that "in every forum a contract is

2. governed by the law with a view to which it is made." When the intention of the parties in that regard is made to appear, it will be given

1. effect, except where they are actuated by fraud.

*Cable Co. v. McElhoe* (1915), 58 Ind. App. 637, 108 N. E. 790. It thus appears that the intention of the parties, as to what law should govern the contracts in question, was a material fact for the court's determination. It will be observed that each of the contracts provides that upon acceptance of the proposal, which forms a part thereof, the contract "shall be deemed consummated at Chicago, Illinois." In other words, the contracts were to be deemed executed at Chicago, Illinois. This fact, when considered in connection with the provision that the machinery was to be furnished f. o. b. cars at Chicago Heights, Illinois, may be said to give rise to a presumption that each of said contracts was to be governed by the laws of that state. This presumption, however, may be rebutted, and parol evidence is admissible for that purpose, where such evidence does not contradict or vary the terms of such contract. *Cable Co. v. McElhoe, supra*. It will be observed that the amendment, which appellant sought to make to its intervening petition, relates to the shipment of the machinery in question into this state, by appellant, after the execution of the contracts, and as to its continued location in this state, at the factory of the Midland Recoveries Company, ever since said time. These facts

were proper to be considered as bearing on the intention of the parties with reference to the location of the machinery while said contracts of conditional sale were in force, and in determining what laws should govern the same. It will be observed that the contracts in question do not provide by whom, to whom, or to what destination the machinery was to be shipped, after it was furnished on the cars at Chicago Heights, Illinois, in conformity with the contracts, or where it was to be located thereafter. Therefore any extraneous evidence in that regard would not tend to contradict or vary the terms of such contracts, and the proposed amendment was not objectionable on that ground. We are of the opinion that the amendment in question should have been allowed, and that the court erred in overruling appellant's motion for leave to make the same.

We next direct our attention to the alleged error in overruling the demurrer to appellee's second paragraph of answer. It will be observed that said

3. paragraph of answer proceeds upon the theory that appellant's conditional sale contracts are governed by the law of Illinois, and that under the law of that state such contracts are fraudulent and void, as against the creditors of the Midland Recoveries Company. In the absence of any averments as to what the law of Illinois is, relating to such contracts, it would be presumed that the common
4. law in that regard, as interpreted and applied in this state, prevails there. By such law the sale of personal property, under the circum-
3. stances shown, on condition that the title shall remain in the seller until the purchase price is paid, is valid, and the seller retains ownership

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though he delivers possession to the purchaser. *Swain v. Schild* (1917), 66 Ind. App. 156, 117 N. E. 933. To meet this presumption, appellee has alleged that it is the law of Illinois that *bona fide* purchasers and execution creditors of a vendee in possession of a chattel, under a conditional sale contract, are entitled to protection, as against the claim of the original vendor. We may assume therefore that, except as otherwise alleged, the common law, as stated above, governs conditional sale contracts in the State of Illinois. Under these circumstances, we are required to consider only whether the allegations of the paragraph of answer in question show that appellee, or those he represents, occupies the relation of *bona fide* purchasers or execution creditors toward the machinery described in the intervening petition, in determining the sufficiency of the paragraph of answer in question. It is apparent that neither appellee, as the

receiver of the Midland Recoveries Company,  
5. nor the stockholders thereof, whom he represents, occupy such relationship, under the facts alleged. But can the same be said of the creditors of said company, whom the receiver also represents? There is no basis for a claim that they are *bona fide* purchasers, and appellee does not so contend. He does assert, however, that the seizure of the machinery in question by the receiver was in the nature of an equitable levy by the court, and fixed thereon a lien in favor of the general creditors of the Midland Recoveries Company, and that this fact entitled them to protection under the law of Illinois relating to conditional sale contracts, as execution creditors of said company. We cannot concur in this contention. *Smith v. Hotel Ritz Co.* (1908), 74 N. J. Eq.

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616, 70 Atl. 137. It should be noted that the terms, "creditor," "judgment creditor," and "execution creditor," each have their special meaning. A creditor has been defined to be one who has a legal right to damages or a debt, capable of enforcement by judicial process. *Bishop v. Redmond* (1882), 83 Ind. 157. A judgment creditor may be said to be one whose claim has been merged into a judgment against his debtor, and under which, generally, execution may be had. *Anderson, Law Dictionary* 292. An execution creditor is one who, having recovered a judgment against the debtor for his debt, has also caused an execution to be issued thereon. *Black, Law Dictionary* (2d ed.) 297, 298. Thus it will be seen that the kind of creditor to whom the law of Illinois affords protection, as disclosed by the paragraph of answer under consideration, is not merely a general creditor, nor one who has reduced his claim to judgment and rested there, but one who has gone farther, and, after obtaining a judgment, has armed himself with that process of the law known as an execution. The paragraph of answer under consideration not only fails to show that there was any creditor of the Midland Recoveries Company who had an execution against it, but also fails to show that any of its creditors had obtained a judgment on their claims, which is a condition precedent to the issuance of an execution. We therefore conclude that said paragraph of answer fails to show that any creditor of said company belongs to that class which the law of Illinois designates as entitled to protection against the vendor in a conditional sale contract. It follows that the court erred in overruling appellant's demurrer thereto, even if it could be said that the conditional sale con-

tracts are governed by the law of Illinois under the facts alleged. Having reached the conclusion announced with reference to appellee's second paragraph of answer, we deem it unnecessary to consider the alleged error of the court in sustaining the demurrer to the second paragraph of appellant's reply addressed thereto, and especially in view of what we have said heretofore in considering the action of the court in overruling appellant's motion for leave to amend its intervening petition.

Appellant contends that the court erred in overruling its motion for a new trial. An examination of the record discloses that this contention is well

6. taken, on the ground that the decision of the court is not sustained by sufficient evidence.

The contracts, made a part of appellant's intervening petition, were introduced in evidence, and they show that appellant, as vendor of the machinery in question, reserved title thereto until the purchase price thereof was paid. Other evidence introduced, and admissions made, tend to show that the purchase price of said machinery had not been fully paid, and that appellee held possession of the same solely by virtue of his appointment as receiver of the vendee named in said conditional sale contracts. Under these facts, the law of this state would protect appellant's title, as such vendor, as against any claim of the receiver of the Midland Recoveries Company, or any one whom he represents. Its title would likewise be protected under the law of Illinois as pleaded; since the evidence fails to disclose that the right of any *bona fide* purchaser, or execution creditor, had intervened. The evidence, therefore, is insufficient to sustain the decision of the court, whether the law of this state or

the law of Illinois governs the conditional sale contracts in question.

Appellant also predicates error on the action of the court in refusing to admit certain evidence offered by it with reference to the shipment of the machinery covered by said contracts, after it was delivered on the cars at Chicago Heights, Illinois, in conformity therewith. In view of what we have said relating to the action of the court in refusing to permit appellant to amend its intervening petition, these or like questions will probably not arise on another trial, and we therefore deem it unnecessary to prolong this opinion by a discussion of the questions thus presented.

The judgment is reversed, with instructions to sustain appellant's motion for a new trial, to sustain its motion for leave to amend its intervening petition, and to sustain its demurrer to appellee's second paragraph of answer thereto, and for further proceedings consistent with this opinion.

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ROGERS ET AL. v. ROGERS ET AL.

[No. 10,470. Filed April 18, 1919. Rehearing denied June 25, 1919.]

1. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Death Arising Out of Employment.***—Where a servant was killed by the accidental overturning of an automobile while conveying workmen from one camp to another at the direction of a member of the firm employing him, a duty which was frequently performed by him, the death arose out of the employment. p. 665.
2. **MASTER AND SERVANT.—*Rights of Master.—Duties of Servant.***—It is the exclusive province of the master to determine the advisability of directing an employe to perform a certain duty and whether the performance of that duty would inure to the benefit of the business. p. 667.

3. **MASTER AND SERVANT.—Duty of Employee.—Obedience to Orders.**—It is the duty of an employee to obey all reasonable orders and instructions of his employer. p. 668.
4. **MASTER AND SERVANT.—Dismissal of Employee.—Disobedience.**—Generally, an employee's disobedience to the master's orders justifies a rescission of the contract of service and a peremptory dismissal. p. 668.
5. **MASTER AND SERVANT.—Workmen's Compensation Act.—Performance of Duty at Master's Order.—Estoppel.**—Where an employee of a firm of contractors was killed by the overturning of an automobile while conveying a workman to a certain camp, at the direction of a member of the firm, such service being of the kind deceased was accustomed to perform, the employer will be estopped from claiming that the employee was acting for the private benefit of an individual member of the firm. p. 668.
6. **MASTER AND SERVANT.—Creation of Relationship.—Contract.—Conduct.**—The relation of employer and employee is contractual and is a product of the meeting of the minds, and to create such relation there must be an express contract or such acts as will unequivocally show that the parties recognize one another as master and servant. p. 668.
7. **MASTER AND SERVANT.—Contract of Employment.—Requisites.—Definiteness as to Parties.**—It is essential that a contract of employment be definite and certain as to parties. p. 669.
8. **MASTER AND SERVANT.—Workmen's Compensation Act.—Contract of Employment.—Compensation.**—In view of §4 of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), the obligation of the employer to pay, and the right of the employee to receive, compensation in accordance with the provisions of such act, becomes a part of every contract of service between every employer and employee covered by the act. p. 669.
9. **MASTER AND SERVANT.—Workmen's Compensation Act.—Appeal.—Review.—Evidence.**—In a proceeding for compensation for the death of a workman killed by the overturning of an automobile which he was driving at the direction of a member of a firm which employed him, wherein it was contended that at the time of his death decedent was performing a service for such firm member and not for the firm, evidence held to show that deceased was in his regular and usual employment for the firm at the time of the accident. p. 670.
10. **MASTER AND SERVANT.—Workmen's Compensation Act.—Employment of Son by Father.—Proceedings for Compensation.—Presumption.**—The fact that deceased was an adult son of a member of the employing firm creates no presumption affecting proceed-



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ings against the firm for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for the son's death. p. 670.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Edna Rogers and others against John S. Rogers and another. From a denial of an award, the applicants appeal. *Reversed.*

*Rufus W. East* and *Lee & Lee*, for appellants.

*Miller & Blair, Fesler, Elam, Young & Carter* and *L. S. Babcock*, for appellees.

DAUSMAN, C. J.—On June 5, 1917, one Horace M. Rogers was driving an automobile on a public highway. The automobile was accidentally overturned, the machine and driver both falling into a ditch. While held down by the automobile he died by suffocation or drowning. The appellants, his widow and five children, applied to the Industrial Board for an award of compensation on the ground that his death arose out of his employment with the firm of Rogers and Brown. A hearing before one member of the board resulted in an award at the rate of \$10.45 per week. The appellees procured a review by the full board. On June 22, 1918, the full board reviewed the evidence and heard the argument of counsel, and thereupon took the matter under advisement.

On July 15, 1918, the board made the following entry of record: "That it is unable to determine with certainty whether Horace Rogers, at the time he received the injuries resulting in his death, was working for John S. Rogers and Luther Brown as a partnership, or was working for John S. Rogers individually. To the end that this point may be made

definite and certain by evidence, said cause is continued for further hearing upon review and the parties are hereby given permission to introduce additional evidence.”

On September 16, 1918, additional evidence was introduced, and the matter was again taken under advisement.

On November 1, 1918, the Industrial Board, by a majority of its members, denied an award and ordered that the appellants take nothing by their complaint, and that they pay the costs of the proceeding. The minority member of the board was of the opinion that on the facts the appellants are entitled to an award.

There is no controversy whatsoever concerning the following evidential facts: “John S. Rogers and Luther Brown were partners, engaged in the business of constructing and repairing highways in the firm name of Rogers & Brown. The firm had contracts for the construction of at least two roads in Monroe county. One of these roads is known as the Dolan road, and the other is known as the Harrodsburg road. As a matter of convenience and expediency, the members of the firm divided their work. Rogers had charge of the work on the Dolan road, and Brown had charge of the work on the Harrodsburg road. Each member of the firm owned, as his individual property, a Ford roadster. The firm owned, as firm property, a motor truck and some teams. Each member of the firm also owned some teams individually. Three teams were in use on the Dolan road. Brown had about twenty men working under him on the Harrodsburg road. Whenever on account of rain it became too wet to work down at the

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Harrodsburg job, Brown and his entire crew would come up to the Dolan road where they would work until conditions would permit them to resume at the former place. Sometimes John S. Rogers and the men under him would go down to the Harrodsburg road and work there.

“Horace Rogers was a son of John S. Rogers, and was about 29 years of age. He had a wife and five children with whom he lived as head of the family. He had been employed by Rogers & Brown ever since the firm was organized in 1915. He acted as a sort of general helper. He would run the drill, boss the quarry, direct the workmen, and do whatever the firm had for him to do. He had no regular hours for beginning or quitting work. Sometimes he would get up at three o'clock in the morning and load the holes and shoot them. He sometimes hauled coal on the truck. Sometimes he would start at nine o'clock or later in the evening to take supplies on the motor truck from Bloomington to the camps. The Dolan camp was about six miles north, and the Harrodsburg camp was about fifteen miles south, from Bloomington. He would use either automobile, or the truck, as convenience required, in the business of the firm. He would convey men and supplies back and forth between town and camps; and that was part of his work. During the progress of the work on the Harrodsburg road he spent practically all of his time there with Mr. Brown. He had more experience in road building than Mr. Brown, and the latter relied on him for advice. The firm paid him \$15.00 per week and board at the camp. The board was worth \$4.00 per week. His wages had been paid him uniformly by the firm of Rogers & Brown.

“On the night of April 4, 1918, it rained so that it became too wet to work. The next morning Horace went to Bloomington to register for military service, and Mr. Brown went with him. They arrived at Bloomington about eleven o'clock a. m. At noon Horace went to his own home for dinner. After he had registered, he and Brown bid on a road contract which the county commissioners were letting on that day. The bids were opened at 2 p. m. and their bid was rejected. About 4 p. m. he showed Brown his registration card and said jokingly that he would not need that road contract, for he would have to go to war. Then Brown and Horace went to a garage. At the garage Horace said to Brown: ‘I will go and take the men out there. How long will you be gone?’ Brown answered: ‘Not very long.’ Horace replied: ‘Well, if I am not back when you get back, you wait here and I will meet you and we will go back to the work at Harrodsburg.’ Then Horace took his father’s car and started to the camp at Dolan, to take the men out there. Brown waited for him until supper time. Then, supposing that Horace had gone to his own home to get supper, as he sometimes did, Brown stepped into a picture show. Soon after entering the picture shown, Brown was informed of the accident.

“Two other workmen went from the Dolan camp to Bloomington that morning to register for military service. One of them, Andy Walke, worked on the Dolan job part of the time, and part of the time on the Harrodsburg job. At this particular time he was up north of town on the Dolan job. In addition to his work on the road he was also stable boss at the Dolan camp. It was his duty to see that all the horses there had proper care. John S. Rogers was in Bloomington

ton that morning, but left at 10:10 a. m. for Osgood. Before departing he left instructions for his son Horace to take his Ford roadster and convey the two workmen from Bloomington to the Dolan camp. He was anxious about the matter and wanted to be sure that Walke would be at the camp that evening to care for the horses. In obedience to this order, Horace took the two men to the Dolan camp, intending to return to Bloomington and from there to go to the Harrodsburg camp. On his way back, the road being wet and slippery, the machine skidded and turned over, resulting in his death. The firm of Rogers & Brown carried insurance for the benefit of their employes in accordance with the Workmen's Compensation Act."

From the facts as above stated there is but one legitimate conclusion to be drawn, viz., that the death of Horace Rogers arose out of his employment

1. with the firm of Rogers and Brown. It will be observed that for a considerable time he had been employed by the firm of Rogers and Brown, and that his wages had been paid uniformly by the firm of Rogers and Brown. When the nature of the work which he had been doing from day to day for that firm is taken into consideration, the presumption naturally arises that, while conveying the workmen to the camp and returning therefrom, in obedience to the order given by a member of that firm, he was performing a service which pertained to the firm's business. Each member of the firm stated repeatedly in his testimony that Horace Rogers was in the employment of the firm at the time of his death. As between the firm and the dependents of the deceased we perceive no reason why an agreement for compensation should

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not have been made in accordance with §57 of the Workmen's Compensation Act. Acts 1915 p. 392, §8020o2 Burns' Supp. 1918.

But Horace Rogers was a son of John S. Rogers, and a strong friendship existed between Horace and Luther Brown. Apparently these circumstances generated a suspicion of collusion as against the insurance carrier. The insurance carrier was made a defendant in the proceeding before the Industrial Board, and is named as an appellee in this court. From all the circumstances of the case, we must assume that the attorneys appearing of record for the appellees really represent only the insurance carrier. Accordingly the hearing was devoted to the single purpose of testing the truthfulness of the admissions made by the members of the firm. The hearing was continued for the express purpose of procuring evidence which would definitely settle the question whether the deceased was an employe of the firm or an employe of John S. Rogers at the time the fatal accident occurred. After two months the hearing was resumed, but the evidence then presented was not of a character to furnish much additional light on that question.

In addition to the facts above stated, the evidence discloses without conflict that John S. Rogers had an arrangement with his partner whereby he received pay for the use of the teams owned by him when used in the partnership business. His compensation for his teams was computed by the hour for the time they actually worked for the firm. He paid from his individual funds for the feed consumed by all the horses at the Dolan camp, and also paid from his individual funds various other items of expenses occasioned by

the work there. Brown managed the business at the Harrodsburg camp on the same plan. From time to time the two partners would "get together" and adjust their accounts. By these periodical adjustments each partner would "get back" his individual money so expended.

The evidence is confusing and uncertain as to how Mr. Walke was paid in the first instance. John S. Rogers paid him, but whether he paid him from his individual funds or by the firm's checks is not clear. The evidence as to the ownership of the teams at the Dolan camp is also conflicting; and whether all of them belonged to Rogers, or part of them to Rogers and part to the firm, is not clear.

The method of conducting the firm's business evoked a series of questions. In whose employment was Mr. Walke? If John S. Rogers paid Mr. Walke from his individual fund, would not that fact make Mr. Walke the employe of John S. Rogers as an individual? If Mr. Walke was the employe of John S. Rogers as an individual, does it not follow logically that Horace Rogers was in the employment of John S. Rogers when taking an employe of John S. Rogers to the partnership camp on the Dolan road and while returning therefrom?

It is unnecessary to determine whether Mr. Walke was an employe of the firm or an employe of John S. Rogers. If Mr. Walke were asking compensa-

2. tion for an alleged injury arising out of his employment with the firm of Rogers and Brown, and if his right to compensation was being contested on the ground that he was not an employe of the firm, then his status as an employe necessarily would have to be determined; but in the case at bar,

it is wholly irrelevant. When a member of the firm directed Horace Rogers to take Mr. Walke to the Dolan camp, it was his duty to obey. There was no obligation resting on him to inquire whether the performance of that duty would inure to the benefit of the firm. That question was no concern of his. It would be an unjust and unreasonable rule that would have required him to decide that question at his peril. The presumption is that the master knows his own business; and it is the exclusive province of the master to determine questions of that character for himself.

It is the duty of an employe to yield obedience to all reasonable orders and instructions of his employer. This rule is fundamental. Disobedi-

3-5. ence, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employe. 18 R. C. L. 520. As between Horace Rogers and the firm, it is immaterial whether Mr. Walke was an employe of Rogers and Brown, or of John S. Rogers, or whether he was anybody's employe. The direction given to Horace to convey the workman to the Dolan camp was reasonable; it called for a service of the kind he was accustomed to render for the firm; and it was his plain duty to perform it. As between him and the firm, the latter cannot be heard to say that the performance of that duty was for the private benefit of an individual member thereof.

The relation of employer and employe is contractual. Like every other contractual relation, it is the product of a meeting of the minds. *West-*

6. *ern Union Tel. Co. v. Northcutt* (1909), 158 Ala. 539, 48 South. 553, 132 Am. St. 38; 18 R. C. L.



490. To create the relation of employer and employe there must be an express contract, or such acts as will show unequivocally that the parties recognize one another as master and servant. 18 R. C. L. 493. It is essential to the existence of every contract of employment that it be definite and certain as to parties. *Parsons v. Trask* (1856), 7 Gray (Mass.) 473, 66 Am. Dec. 502. By virtue of §4 of the Workmen's Compensation Act, *supra*, the obligation of the employer to pay, and the right of the employe to receive, compensation in accordance with the provisions of said act becomes a part of every contract of service between every employer and employe covered by said act, *supra*. *Carl Hagenbeck, etc., Shows Co. v. Leppert* (1917), 66 Ind. App. 261, 117 N. E. 531. To the employe this right to compensation is a precious element of the contract. One of the considerations, and an important one, which he gives for that right, is the relinquishment by himself and his dependents of all other rights and remedies at common law or otherwise for his injury or death arising out of the employment. §6 W. C. A., *supra*. A contract of this character will not be lightly overturned.

The relation of employer and employe, having been created by the voluntary act of the parties, usually must be terminated by the parties. It may be terminated, of course, by the death, illness, or insanity of either party, by the expiration of the term fixed in the contract, or by mutual consent. The employer may dismiss his employe at any time for cause, or arbitrarily and without cause. The employe may quit the service of his employer at any time for cause, or arbitrarily and without cause. Of course, in some

instances there may be liability for damages resulting from breach of contract; but that feature is not here involved.

In the case at bar there is nothing in the evidence tending to indicate an intention on the part of any person concerned to terminate the relation of

9. employer and employe which had long existed between Horace Rogers and the firm of Rogers and Brown, or to indicate a mutual understanding that the particular service rendered by him should be regarded as outside the regular employment. Therefore, we must and do hold that from the time he started the automobile on the trip to the Dolan camp to the time of his death he was in the regular and usual employment of the firm of Rogers and Brown.

Horace Rogers was not a member of his father's family. He had been long emancipated and was living with his wife and children. No presumption

10. arises out of the mere relation of father and son which can have any influence on the case at bar. There is no evidence to show that the relation of father and son has any bearing whatever on the controversy.

The action of the Industrial Board is reversed, and said board is directed to make an award of compensation.

Batman, P. J., did not participate.

## PRICE v. MITCHELL.

[No. 9,926. Filed June 25, 1919.]

1. *APPEAL.—Record.—Admissions of Counsel.*—Admissions or statements of counsel as to matters which do not otherwise appear in the record will not be considered by the court on appeal. p. 672.
2. *EVIDENCE.—Documents.—Denial of Execution.—Statute.*—In an action for possession of real estate and to recover damages for its detention, where defendant relied upon a written instrument purporting to give him the right of occupancy free of rent, but no pleading was founded on such instrument, §370 Burns 1914, §364 R. S. 1881, providing that when a pleading is founded on a written instrument, such instrument may be read in evidence without proving its execution, does not apply. p. 673.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Mary B. Mitchell against Albert W. Price. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*William P. Henderson* and *William E. Henderson*, for appellant.

*Denny & Miller* and *Shirts & Fertig*, for appellee.

NICHOLS, P. J.—This was an action commenced in the Marion Superior Court, and on change of venue tried in the Hamilton Circuit Court, for the possession of, and damages for the detention of, certain real estate described in the complaint, and located in Marion county, Indiana. The appellant filed an answer in general denial to the complaint, and the cause, being at issue, was submitted to the court for trial. There was a finding for the appellee, and that she was entitled to the immediate possession of the real estate described in the complaint, and damages

for the detention thereof in the sum of \$264. After a motion for a new trial, which was overruled, appellant prosecutes this appeal.

The only error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial. The errors there assigned can only

1. be presented to this court by a bill, or bills, of exceptions. The only reference to such an instrument is found in the following language, taken from appellant's brief: "Subsequent to the filing of said bond, appellant failed to file his transcript and bill of exceptions within sixty days after giving said bond." While the appellant makes some statements of what purports to be evidence, there is no proper showing of any kind whatever that there was any evidence in the cause. Without the evidence and proceedings at the trial the case must be affirmed. Notwithstanding this condition of the record on appeal, appellee's attorneys, four in number, with an appearance of magnanimity that is beyond our comprehension, plainly inform the court that "the evidence is in the record," and then proceed to supplement the purported evidence contained in appellant's brief with additional statements thereof. It is a general rule of law that admissions or statements of counsel, as to matters which do not otherwise appear in the record will not be considered by the Appellate Court. 4 C. J. 557. Without considering the applicability of the principle to the case at bar, we have examined the purported evidence as presented by counsel, both for appellant and appellee, and conclude that it is sufficient to sustain the finding of the court. The deciding question involved is as to the right of appellant to occupy the premises involved, and free

of rent, which he undertook to establish by the following instrument:

“Exhibit No. 3.

“I agree with Mattie Price if she and her husband will build two rooms for me so I will be to myself, when the two rooms are completed they can have the front part of the house without rent as long as I live if they will help me to build two rooms I will put in one hundred forty dollars and Mattie Price and her husband to furnish the balance of the money.

“Witness

Mary B. Mitchell

Mattie Price

A. W. Price

Lucy Porter

Wm. Cook.”

The appellee strenuously insists that she did not sign this instrument, and that it is a forgery, and so testified, as she had a right to do. No plead-

2. ing was founded upon it, and therefore §370

Burns 1914, §364 R. S. 1881, does not apply.

It does not appear by the record that such instrument was ever introduced in evidence. The trial court may have refused to consider it upon either of these grounds, and this court would not be justified in disturbing such trial court's conclusion. The finding of the court is sustained by sufficient evidence. There are no reasons discussed as to why the decision of the court is contrary to law, nor is the question of excessive damages presented.

The judgment is affirmed.

## HOME BREWING COMPANY v. CITY OF INDIANAPOLIS.

[No. 9,957. Filed June 25, 1919.]

1. **APPEAL.—Review.—Ruling on Motion for Judgment on Interrogatories.—Scope of Review.**—In determining whether the trial court erred in overruling motion for judgment on interrogatories, the court on appeal will consider only the complaint, the general verdict, and the interrogatories, together with the answers thereto. p. 679.
2. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.—Presumptions.**—In reviewing the trial court's ruling on a motion for judgment on the interrogatories, all reasonable presumptions should be indulged in favor of the general verdict over the answers to interrogatories. p. 679.
3. **MUNICIPAL CORPORATIONS.—Defective Sidewalks.—Damages for Personal Injuries.—Recovery Over by City.**—Where a sidewalk is rendered unsafe by the wrongful act or negligence of a third party, and the city is compelled to respond in damages for injuries resulting from the defective condition, it has a right of action against the party responsible for the condition of the sidewalk for the amount it has been compelled to pay. p. 680.
4. **MUNICIPAL CORPORATIONS.—Defective Sidewalks.—Personal Injuries.—Indemnity.—Adjudication as Against City.—Conclusiveness as Against Indemnitor.—Estoppel.**—Where a city, primarily liable to a pedestrian for injuries due to a defective sidewalk, notifies the person responsible for the defect of the action against it, such person will be bound by the judgment rendered against the city, but will not be estopped from showing that he was under no obligation to keep the street in safe condition and that the accident did not occur through his fault. p. 680.
5. **MUNICIPAL CORPORATIONS.—Defective Sidewalk.—Personal Injuries.—Indemnity.—Wrongful Use of Sidewalk.—Liability.**—Where a saloonkeeper rolled beer kegs over a sidewalk to an elevator therein for a period of several years, and, as a result of the wear incident to such practice and the use of the walk by the general public, a depression was caused which resulted in injury to a pedestrian for which the city was compelled to respond in damages, the use of the sidewalk by the saloonkeeper was not wrongful so as to render him liable to the city. p. 680.
6. **MUNICIPAL CORPORATIONS.—Streets and Sidewalks.—Duty to Repair.—Personal Injuries.—Liability.**—The duty of repairing streets and sidewalks is upon the city, and abutting property own-

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ers and persons using the street in a legitimate way are not liable to a person injured by reason of defects resulting from the use of the street, unless such use is wrongful and unlawful. p. 681.

From Shelby Circuit Court; *Alonzo Blair*, Judge.

Action by the City of Indianapolis against the Home Brewing Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

*J. W. Fesler, Harvey J. Elam, Howard S. Young and Meiks & Hack*, for appellant.

*William A. Pickens, Walter Myers, Russel J. Ryan, Edward W. Hohlt, Adams & Jones, and Paul G. Davis*, for appellee.

NICHOLS, P. J.—This was an action by the appellee city of Indianapolis against the appellant Home Brewing Company commenced in the Marion Circuit Court, and finally tried on change of venue in the Shelby Circuit Court. It was to recover \$2,000, with interest and costs, which the city of Indianapolis had paid upon a judgment for that amount which one Mattie Crawford had obtained against the city as damages for injuries received when she stepped into a depression in the sidewalk in front of lands in Indianapolis owned by the appellant.

The complaint is in substance as follows: The appellant was a corporation engaged in the manufacture and sale of various kinds of beer, and as a part of its operations owned land in the city of Indianapolis, described as 39 South Delaware street, which it occupied with a saloon. On September 5, 1913, Mattie Crawford was injured by means of a defect in the sidewalk immediately in front of said lands by stepping into such defective place, which was about two feet long, a foot and a half wide, and two or three

inches deep, and was located about three inches west of an offset in the sidewalk, and an opening in the surface thereof, which was for an elevator running from the surface of the sidewalk to the basement of such premises, which was used, owned and controlled by the appellant for the purpose of conveying kegs of beer delivered by the appellant in front of the building on said lands, such beer being transferred from delivery wagons by a chute, and carried of its own motion to the edge of the raised place in the sidewalk, and from there placed on such elevator; and all kegs of beer taken from the premises were raised from the basement to the sidewalk at this point and taken away by the appellant. Said defective place was about seven feet northwest of the entrance to the saloon. By reason of the use which appellant made of the sidewalk said hole was caused to exist, with full knowledge of the appellant at all times of its existence, and appellant allowed the same to remain open and dangerous to persons using the sidewalk for ordinary travel without attempting to warn them of the dangerous condition, and appellant continued on and prior to said date to use such sidewalk in the manner aforesaid. Mattie Crawford was walking along such sidewalk, and stepped into such hole or defect, and was seriously injured. She gave notice to the appellee of her intention to hold the city responsible for damages for such injuries, and on December 19, 1913, filed her suit against the appellee in the Marion Circuit Court, which cause was assigned to the Marion Superior Court, room 1, and there set for trial, notice of which was given to the appellant by the appellee to appear and defend such action, which appellant refused and neglected to do. Appel-



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lee defended such action, and on January 14, 1915, said Mattie Crawford recovered judgment against the appellee, by reason of the negligence of the appellant aforesaid, in the sum of \$2,000, which appellee was compelled to pay, and did pay on April 23, 1915, together with six per cent. interest and costs, all of which was without the fault or negligence of the appellee. There was a demand for judgment in the instant case for the amount which appellee was compelled to pay as aforesaid.

The cause was first submitted to a jury for trial, which disagreed and was discharged, and thereafter on change of venue the cause was sent to the Shelby Circuit Court, where there was a trial by jury, which returned a verdict in favor of the appellee and against the appellant for \$2,245.23. The jury also answered interrogatories submitted to it, which, in narrative form, found the following facts:

On September 5, 1913, there was a hole in the east sidewalk of South Delaware street in the city of Indianapolis, Indiana, in front of the premises known as 39 South Delaware street, which was two feet long, one foot and a half wide, and three inches deep at its deepest point, which was in the middle. It sloped up from the deepest point to the edge. This hole started to wear in the sidewalk about four years before September 5, 1913, and gradually grew larger from wear until said date. It was about six inches west of an elevator used for lowering beer and other articles to the basement of said premises. The level of the elevator when raised was about six inches above the sidewalk level. The premises were occupied by Christian Reis, and had been so occupied by him for eight years prior thereto, for saloon purposes. Said Reis

bought his beer of the appellant, who delivered the same in kegs by wagon, and unloaded it for said Reis at the Delaware street curb. In unloading the kegs they were unloaded from the wagon to a mat or cushion on the sidewalk near the curb, and then rolled six or eight feet across the sidewalk to the elevator opening, and then raised and placed on the elevator. The empty beer kegs were raised from the basement on the elevator, and were then lowered from the elevator to the sidewalk, and rolled across the sidewalk and lifted into the appellant's wagon. The deliveries of beer made by appellant were not by means of a slide or chute from the delivery wagon to a point in front of the sidewalk to the elevator where the hole was. Soft soap in barrels, pickles in barrels, sourkraut in barrels, whisky in barrels, bottled wines and liquors, and ice in 100 and 200-pound pieces were delivered to said Reis at the Delaware street curb and lowered to the sidewalk, rolled across the same and placed on the elevator. None of these deliveries were made by the appellant. The effect of all these deliveries, removals and uses was to gradually wear the hole complained of in the sidewalk in front of the elevator. The point where the hole complained of was located is in the business portion of the city of Indianapolis, where a large number of people were walking every day on and over said sidewalk on said east side of Delaware street.

In loading and unloading said elevator it was necessary to use the sidewalk of said Delaware street at the spot where the hole complained of was worn. The appellee was sued February 14, 1914, having been notified of the accident in November, 1913. The appellee undertook to defend such suit, first notifying

the appellant that it expected the appellant to pay any judgment that might be rendered against it. This notice was when the appellant participated in the preparation for the trial. The trial began January 8, 1915, and said Mattie Crawford was injured September 5, 1913. It was provided in the lease that the tenant was to make the repairs, such repairs being on the building only. When the hole first appeared it was very small and gradually wore bigger as the sidewalk was used. The kegs of beer delivered by appellant were so delivered in the regular course of business, and the hole in question was about six feet from the curb.

The appellant filed its motion for judgment in its favor on the interrogatories and answers thereto, notwithstanding the general verdict, and thereafter within thirty days filed its motion for a new trial. The court overruled appellant's motion for judgment on answers to interrogatories, and also overruled its motion for a new trial, and thereupon entered judgment in favor of the appellee, and appellant now prosecutes this appeal from said judgment.

In determining whether the trial court erred in overruling appellant's motion for judgment in favor of appellant on the interrogatories and answers

- 1-2. thereto, this court considers only the complaint, the general verdict and the interrogatories, together with the answers thereto. All reasonable presumptions should be indulged in favor of the general verdict, and nothing will be presumed in favor of the answers to interrogatories.

If a city sidewalk is rendered unsafe by the wrongful act or negligence of a third party, and the city, by

- reason of its primary liability, is compelled to
3. respond in damages for injuries caused by such unsafe condition, it has a right of action over against the party so rendering the sidewalk
  4. unsafe for the amount which it has been compelled to pay, and if the party so causing the unsafe condition is properly notified of such action against the city, the injuring party will be bound by the judgment against the city (*City of Anderson v. Fleming* [1903], 160 Ind. 597, 602, 67 N. E. 443, 66 L. R. A. 119; *City of Bloomington v. Chicago, etc., R. Co.* [1913], 52 Ind. App. 510, 98 N. E. 188; *Town of Centerville v. Woods* [1877], 57 Ind. 192), but, in order that the city may recover, it must appear that the unsafe condition of the sidewalk has been brought about by the *wrongful act* or *omission* of such alleged injuring party (*Town of Centerville v. Woods, supra*), and such alleged injuring party will not be estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident occurred.
- Catterlin v. City of Frankfort* (1881), 79 Ind. 547, 41 Am. Rep. 627. There is no charge in the complaint in this action that the appellant had made any wrongful use of the sidewalk. It was engaged in a business that at the time was lawful, and it had a right under the law to deliver to its customers its merchandise over and upon the sidewalks of the city. There is no violent or improper act charged in the complaint as to its method of delivery, unless it may be said that the charge of transferring its kegs of beer from its delivery wagon to chutes, and then allowing it to reach the sidewalk by its own motion, was an improper and violent use of its privi-

lege, and this method of delivery is denied by the jury's answers to interrogatories. The use of the sidewalk for the purpose of delivering its merchandise was in common with a similar use of the sidewalk made by a number of other persons. The defect in the sidewalk was not a result of any affirmative wrongful act on the part of the appellant, but was the result of the continuous use thereof for four years or more by this appellant and others, including the general public walking over such sidewalk, which continuous use for four years resulted in the defect complained of. All of these uses made of the sidewalk were proper and legitimate, and such uses produced the gradual wear which resulted in the defect complained of.

The duty of repairing streets and sidewalks is upon the city, and not upon the abutting property owners, or upon the persons using such streets or side-

6. walks in a legitimate way, and such abutting property owners and such persons so using the street are not liable to a person injured by reason of the defect produced by such uses, unless such uses were wrongful and unlawful. *City of Elkhart v. Wickwire* (1882), 87 Ind. 77; *Town of Centerville v. Woods*, *supra*; *City of Bloomington v. Chicago, etc., R. Co.*, *supra*.

It appears by the answers to interrogatories that the appellant had not made an improper or wrongful use of the sidewalk, and, it not being appellant's duty to repair the same, appellant's motion for judgment in its favor upon the answers to interrogatories should have been sustained.

The judgment is reversed, with instructions to the trial court to sustain appellant's motion for judgment on the answers to interrogatories.

SUPREME LODGE KNIGHTS OF PYTHIAS *v. GUESS*.

[No. 9,710. Filed March 14, 1919. Rehearing denied June 25, 1919.]

INSURANCE.—*Life Insurance.—Insurer's Refusal to Accept Premium.—What Constitutes.—Necessity of Tender.*—Where the holder of a fraternal benefit certificate of life insurance elected to accept a certain option to pay \$6.50 per month in cash and have the balance of the monthly assessment of \$11.30 charged against his insurance, a notice received the month following such election from the secretary of his local lodge which stated, "You will please and send remittance on this policy at once so I can send it in, \$11.30 Eleven Dollars and Thirty Cents," did not constitute a refusal on the part of insurer to accept anything less than the full amount of \$11.30 in cash, so as to make it unnecessary for insured to tender the \$6.50 required under his option.

From Vanderburg Circuit Court; *Duncan C. Givens*, Judge.

Action by Chloe A. Guess against the Supreme Lodge Knights of Pythias. From a judgment for plaintiff, the defendant appeals. *Reversed*.

*James P. Goodrich, Ward H. Watson, James E. Watson, Sol H. Esarey, Robert J. Tracewell* and *Robert N. Tracewell*, for appellant.

*George K. Denton*, for appellee.

REMY, J.—This action, instituted by appellee, is based on a fraternal benefit certificate of life insurance issued by appellant to William M. Guess, husband of appellee. The only issues properly presented by this appeal arise out of the action of the circuit court in overruling appellant's motion for a new trial. That motion contains numerous specifications, but, in our view of the case, it is necessary to consider only those which relate to the refusal of appellant's tendered instructions Nos. 5 and 7.

It appears from the evidence that for many years prior to 1911 William Guess was a member of appellant society, and held a benefit certificate in its insurance department. In August, 1910, pursuant to an amendment of its by-laws, regularly enacted, appellant rerated its members, and issued to said Guess, among others, a new benefit certificate. This certificate, which was accepted by Guess, called for a monthly assessment of \$11.30 to be paid by him for the maintenance of his insurance after December, 1910; but it was further provided in appellant's amended by-laws that the member might, at his election, avail himself of a certain option, known as option H, under which he would be permitted to pay, on account of said monthly assessment, the sum of \$6.50 in cash, and to have the balance charged against his insurance. On December 22, 1910, Guess elected to accept the provision of option H, and so notified appellant; but during the succeeding month he received a notice from the secretary of appellant's local lodge or section of which he was a member, which notice, omitting address and signature, was as follows:

“You will please and send remittance on this policy at once so I can send it in, \$11.30 Eleven Dollars and Thirty cents. Please attend to this at once. Wishing you best of health.”

Guess did not pay, or offer to pay, the assessment or any part thereof for the month of January, 1911, or for any succeeding month, and appellant thereafter treated the insurance as lapsed. Guess died on December 13, 1914, and in prosecuting this action on the benefit certificate appellee attempts to justify the

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failure to pay assessments subsequently to December, 1910, on the ground that the notice above set out constituted a refusal on the part of appellant to accept anything less than the full amount of \$11.30 in cash, and made it unnecessary for Guess to tender a less amount. The rule relied on would have been applicable in case of an actual refusal on the part of appellant (*Wagner v. Supreme Lodge, etc.* [1917], 64 Ind. App. 510, 116 N. E. 91, 96), but the notice which was sent to Guess is not susceptible of that construction. It was simply a notice and request for payment of an amount alleged to be due. It did not, in itself, operate as a refusal to accept less than the amount therein set forth. Appellant's tendered instructions Nos. 5 and 7 construed the notice as not constituting a refusal to accept the proper amount, if the same had been tendered; and, not having been covered by other instructions given, the refusal of the court so to instruct the jury was reversible error.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

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#### WESTERN LIFE INDEMNITY COMPANY v. COUCH.

[No. 9,739. Filed April 18, 1919. Rehearing denied June 25, 1919.]

1. **APPEAL.**—*Record.*—*Rules of Court.*—*Substantial Compliance.*—Where there has been a substantial compliance with the rules of court requiring appellant to have the record paged and indexed and to have marginal notes made, the appeal will not be dismissed for failure to comply with the rules. p. 696.
2. **INSURANCE.**—*Life Insurance.*—*Action on Policy.*—*Question of Law.*—*Construction of Policy.*—In an action against a reinsuring company on a life policy issued by it, where both the original policy and the ones sued on and the reinsurance contract are set



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out in the pleadings, it is a question of law whether the incontestable clause in the original policy became a part of the policy issued by defendant. p. 697.

3. **INSURANCE.—Life Insurance.—Construction of Policy.—Reinsurance.**—Where a reinsurance contract gave the policy-holders the option of paying the reinsurance company the same premiums, and receiving insurance in such amount as the premiums would purchase according to an annexed table of rates, or of making application, and by furnishing satisfactory evidence of insurability, receive a new policy upon surrendering the old one for cancellation, an incontestability clause contained in the old policy did not become a part of a new policy issued to one choosing the second alternative, in the absence of any provision to that effect. p. 697.
4. **INSURANCE.—Life Insurance.—Action on Policy.—Reply.—Sufficiency.**—In an action on a life policy, where the insurer answered that insured had falsely warranted that he was in good health and had never previously been refused insurance, and that, if it had known that insured was afflicted with a certain disease, which he fraudulently concealed, the policy would not have been issued, a reply alleging knowledge by the insurer that insured had previously applied for insurance, but not knowledge of the refusal of insurance, or of his disease, was insufficient as against demurrer. p. 698.
5. **INSURANCE.—Life Insurance.—Forfeiture of Policy.—Tender of Premiums.—Reasonable Time.**—Where insured died on April 30, and on August 10 following insured learned of breach of warranty, when it notified the beneficiary of its intention to rescind, and mailed her a check for premiums paid, which she returned without objection to the form of the tender, and, suit having been filed August 19, insurer on November 30 offered to pay the beneficiary in legal tender the amount of premiums paid, together with interest thereon and accrued court costs, the latter tender was made within a reasonable time. p. 700.
6. **INSURANCE.—Life Insurance.—Forfeiture of Policy.—Return of Premiums.—Reinsurance.**—Where a life insurance company became insolvent and one holding a policy therein exercised his option under a contract of reinsurance of surrendering his old policy, taking out a new one in the purchasing company, the latter company, in forfeiting the policy for a breach of warranty, was only required to repay the premiums paid to it. p. 700.
7. **INSURANCE.—Life Insurance.—Forfeiture of Policy.—Breach of Warranty.—Medical Examination.—False Answers.**—Where an application for a new policy in a reinsuring company referred to a medical examination for the original insurance and warranted the statements in it to be true, thereby making them a part of the

new policy, the reinsurer would forfeit such policy for a breach of warranty based upon false statements in the medical examination, although it was not made part of the original policy, and was not in itself a warranty. p. 701.

8. **INSURANCE.—Life Insurance.—Forfeiture of Policy.—Misrepresentation.—Health of Insured.—Refusal of Insurance.**—A false answer by an applicant for insurance that he had never been rejected by, or refused insurance in, any other company, in the absence of waiver or estoppel, renders the policy voidable at the election of the insurer, even though the statement is treated as a representation and not as a warranty. p. 703.
9. **INSURANCE.—Application.—Construction.—Intention of Parties.—Warranties.**—Answers to questions in an application for insurance will not be construed as warranties unless they are clearly shown by the form of the contract to have been so intended by the parties, but where it appears that they so intended they must be literally true or the insurance is voidable. p. 705.
10. **APPEAL.—Presenting Questions for Review.—Instructions.—Brief.—Record.—Duty of Appellee.**—When an applicant desires to challenge the correctness of any instructions given, he must see that all of the instructions given are in the record, but it is only necessary that he set out in his brief those that he claims are erroneous, and if there are other instructions given or tendered by appellant which overcome the alleged error, it is the duty of the appellee to call the court's attention to such instructions and to set them out in his brief. p. 706.
11. **APPEAL.—Presenting Questions for Review.—Refusal of Instructions.—Failure to Identify.—Record.**—Where appellant contends that it tendered instructions numbered from 1 to 19, and that the court erred in refusing to give certain of them, but the record discloses that the bill of exceptions shows that appellant tendered instructions numbered 1 to 20, and does not show those given and refused, no question is presented on appeal. p. 707.
12. **INSURANCE.—Life Insurance.—Forfeiture of Policy.—Estoppel.**—Where an insurer, after receiving information from an investigating bureau that insured had made false warranty as to the condition of his health, wrote a letter to the beneficiary containing no intimation of an intention to rescind, and requesting further proof, which she obtained at some expense, the insurer was not estopped from relying on the breach of warranty to forfeit the policy, where the beneficiary knew of the investigation being made by the insurer and that the policy would probably be contested. p. 710.
13. **INSURANCE.—Forfeiture of Policy.—Estoppel by Conduct.**—An insurance company is estopped to declare a forfeiture of an insurance contract, if with full knowledge of the facts, it states to the

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beneficiary or causes him reasonably to believe that it does not intend to stand upon the right of forfeiture, and by such representations causes the beneficiary to do any act entailing expense and trouble upon the belief that the company has waived such right. p. 711.

14. *INSURANCE.—Life Insurance.—False Warranties.—Forfeiture of Policy.*—Where insured, in his application for insurance, warranted that he had never been refused insurance, the falsity of that warranty was sufficient to avoid the policy. p. 711.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Ida M. Couch against the Western Life Indemnity Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*T. J. Graydon, Condo & Browne and Blackledge, Wolf & Barnes*, for appellant.

*Charles & Gemmill, Blaine H. Ball and Arthur H. Jones*, for appellee.

*McMAHAN, J.*—This is an action to recover on a life insurance policy issued by the appellant on the life of Orlando H. Couch.

The first paragraph of the complaint alleged that on October 1, 1913, the appellant issued to Orlando H. Couch its policy of insurance for \$5,000, payable at death; that said Orlando H. Couch complied with all the requirements of the policy, and afterwards died; and that the appellee made all necessary proofs of death, but that appellant refused to pay the policy, and demanding judgment.

The second paragraph of the complaint alleged that on September 28, 1911, the Monarch Life Indemnity Company of Evansville, Indiana, issued and delivered to Orlando H. Couch and the appellee a joint policy of insurance in the amount of \$5,000, payable to the survivor on death of either of said parties; that a receiver was thereafter appointed for the Monarch

company, who sold the business of said company to the appellant, and that a written contract of the sale was entered into between the receiver and the appellant, which, among other things, provided that the holders of policies in the Monarch company were given the right to continue the payment of the annual premiums which they had formerly paid to the Monarch company and receive from appellant such an amount of insurance as such premiums would pay for, under a rate set out in said contract; that said contract also provided that holders of policies like that issued to appellee and Orlando H. Couch should, by making written application therefor within one year from the date of said contract, receive, free of expense from appellant, a choice of three designated policies, provided that on said new policy the member should pay the premium rate of said Western company applicable to the member's age at the time of acceptance by the Monarch company; that on September 29, 1913, Orlando H. Couch and appellee, in accordance with said contract, made application to appellant for a new policy of insurance in the sum of \$5,000, and that the appellant company issued to them a "cooperative dual life policy" payable to the survivor of them; that Orlando H. Couch died April 30, 1914; that the appellant failed to pay the policy, and demanding judgment.

The appellant filed an amended answer admitting all the material allegations of the complaint, and assumed the burden of proving a defense.

The answer set out the reinsurance contract mentioned in the complaint, and, after setting out the provisions thereof as alleged in the second paragraph of complaint, alleged that when the policy-holders in

the Monarch company made application for insurance they were required to furnish satisfactory evidence of insurability at the time of making such application; that appellant company in said contract reserved the same rights of defense against any liability as could have been exercised by the Monarch company in the absence of said agreement.

It was also alleged that, after the execution of said reinsurance contract, Orlando H. Couch and appellee did not elect to carry their joint life policy, for the reason that the premiums theretofore paid by them would only pay for an insurance of \$2,000.99; that they elected to apply to appellant for the cooperative dual life policy upon their lives for \$5,000; and that they made application for such new insurance on forms prescribed by appellant, a copy of which application is set out; that with their said application said parties furnished and delivered to appellant certain written statements, which were intended by the parties as satisfactory evidence of the insurability of said parties at the time of making such application, said written statement of Orlando H. Couch being also set out in full; that the policy of insurance sued upon was issued by appellant by reason of the foregoing facts, and not otherwise, and that the insurance policy theretofore held by said parties in the Monarch company was surrendered and canceled; that said policy of insurance so issued by appellant company was issued in consideration of and in full reliance upon certain statements and warranties contained in the said application made and signed by said Orlando H. Couch, September 29, 1913, and delivered by him to appellant prior to the execution by it of the policy sued upon; that as a part of said application Orlando

H. Couch delivered therein a "health certificate," which was signed by him and which was as follows:

"I hereby apply to the Western Life Indemnity Company for a dual life policy of \$5,000 on my life, in substitution for policy No. 804 now held by me, which latter policy shall be void upon acceptance of this application by said company.

\* \* \* And as a basis of and consideration for said new policy, I hereby submit and warrant that I am now in sound health, that there is no cause in connection with my physical condition that would be a bar to my securing life insurance or in any way shorten my life; that I am not afflicted with any physical or mental defect or infirmity, that I have never suffered from \* \* \* diseases of the liver or kidneys."

It is then alleged that the statements in said health certificate were false and untrue, in that the said Orlando H. Couch was not in sound health September 29, 1913, and at the time the policy sued upon was issued; that at said time his health and physical condition were such that they would be a bar to his securing life insurance, and were such as to shorten his life; that he was at said time afflicted with a physical defect or infirmity, was suffering from a disease of the liver and kidneys, and other named diseases, which continued to exist and afterwards caused his death; that on several occasions prior to September 29, 1913, and also prior to September 21, 1911, said Orlando H. Couch had had physical examinations made by reputable physicians, in which examinations his urine was tested, and it was discovered that there was present in the urine albumen; that said condition

of the urine indicated the existence, or the approach, of the diseased condition of said Orlando H. Couch hereinbefore described; that Orlando H. Couch was informed of the existence of said condition, and, for the purpose of obtaining the insurance policy sued upon, fraudulently concealed said information from appellant, although he knew at the time that appellant would not issue said policy of insurance or assume said insurance risk if it knew of the existence of said condition, and that he also fraudulently concealed said information from the Monarch company for the same purpose, knowing that, if it possessed said knowledge and information, it would not issue its policy of insurance; that all of said conditions existed prior to September 21, 1911, and Orlando H. Couch, for the purpose of obtaining the insurance at the time of making his application to said Monarch company, fraudulently concealed said information from said Monarch company, and never thereafter disclosed such facts to either the Monarch company or to the appellant company; that Orlando H. Couch, on September 21, 1911, and on September 29, 1913, knew that said conditions existed.

It is then alleged that the application made to the appellant company for the policy sued upon contained the following provisions:

“I hereby make the following warranties;  
\* \* \* inasmuch as the policy hereby applied for in the Western Life Indemnity Company is issued in consideration of my present membership in, or contract with, the Monarch Life Indemnity Company, and as such latter membership or policy is based upon my application therefor to said Monarch Life Indemnity Company, I here-

by expressly warrant to said Western Life Indemnity Company that my said application to said Monarch Life Indemnity Company and the statements and warranties contained in said application, together with all agreements, medical examinations, revival applications and health certificates made by me to said Monarch Life Indemnity Company for the issuance, revival of or continuance in force of my said membership or policy therein, are and were true when made, and, if the same, or any part thereof, was untrue when made, then, and in that case, the policy hereby applied for in said Western Life Indemnity Company shall be void and of no effect.”

It is also alleged that: When Orlando H. Couch made application to the Monarch Life Company for said insurance policy, he made a statement in writing dated September 21, 1911, to his medical examiner, which became and was a part of his application to said Monarch Company for said policy of insurance, which medical statement and application contained the following question and answer: “Have you ever been refused insurance in any company or order? A. No;” that said statement and warranty was false in that the said Couch had theretofore made application for insurance upon his life with the Hartford Life Insurance Company, which application for insurance was refused and rejected by said Hartford Life Insurance Company prior to September 21, 1911; that said statement and warranty was false when made, in that, prior to making said application, he had applied for life insurance in the Mutual Life Insurance Company of New York, which application was also rejected and refused prior to September 21,



1911; that each of the foregoing statements of Orlando H. Couch were warranties and were material to the risk incurred by appellant, and that appellant, at the time of issuing the policy sued upon, had no knowledge of the falsity of such representations or warranties, but relied upon said statements and warranties, and would not have issued said policy sued upon if it had known that any part of said representations and warranties were false; that it did not learn of the untruthfulness of said statements until August 10, 1914, on which day appellant notified the appellee that the appellant had canceled and rescinded the policy sued upon by reason of the misrepresentations and breaches of warranty on the part of Orlando H. Couch, and that appellant held itself accountable for the amount of premiums which had been paid on such policy, and on said day mailed a check to appellee for \$188.35, drawn upon, accepted by, and certified to, by the Central Trust Company of Illinois, the above sum being the full amount of the premiums which had been paid on the policy sued upon; that all the transactions between the parties theretofore had been by checks on banks; that appellee knew that said check was valid; that she was unwilling to receive and accept the amount of the premium paid by Orlando H. Couch on said policy, and would not have accepted the same had tender been made in legal tender; that she returned said check to appellant without making objection to the form of the tender; that appellant, knowing the appellee was unwilling to receive the return of said premium, made no further offer to repay said money except as hereinafter stated; that the appellee refused to join in the cancellation of said policy of insurance, and filed

her complaint herein August 19, 1914, for the full amount of the policy and interest; that a summons was issued for appellant returnable October 1, 1914; that appellant was required to answer November 10, 1914, at which time appellant filed its first answer herein, and paid to the clerk of the court the full amount of the premiums paid upon said policy, to wit, \$188.35, and in said answer declared said policy of insurance rescinded and canceled; that thereafter, on November 30, 1914, appellant tendered and offered to pay appellee in legal tender coin of the United States the sum of \$201.62, being the principal and interest on said premiums, and that it also paid into the clerk's office the additional sum of \$21.72, covering all the accrued court costs; that appellee refused to accept the return of said premium; that all of said money was on said day paid into court, and is now in the hands of the clerk for appellee's benefit and use, by reason of which facts it is alleged that the policy of insurance sued upon is null and void, and was not in force at the time of Orlando H. Couch's death.

The appellee filed a reply in five paragraphs, the first of which was a general denial. A demurrer was sustained to the second and third paragraphs. The fourth paragraph alleged the issuing of the policy by the Monarch company in September, 1911; the execution of the reinsurance contract between the receiver of the Monarch company and the appellant company; the application of Orlando H. Couch to the appellant for the policy sued upon; that the policy sued upon was issued in the place of, and as a continuance of, the policy issued by the Monarch company, in which it was agreed that said policy of insurance and appli-

cation therefor was the entire contract between the parties, said policy and application therefor being set out and made a part of the reply; that no medical examination was attached to or made a part of said policy; that by the express provision of said policy the medical examination referred to in appellant's answer was excluded therefrom; that, according to the terms of the Monarch life policy, it was incontestable after one year from its date, except for nonpayment of premiums; that more than one year had elapsed after it was issued before the death of Orlando H. Couch; that the Monarch company, at the time of issuing the policy, had full knowledge and information of the fact that Orlando H. Couch had formerly made "applications" for insurance upon which policies had not been issued, and that the Monarch company issued the policy to Orlando H. Couch with the information and knowledge of the facts and circumstances connected therewith; and that, at the time when the appellant company issued the policy sued upon, it had knowledge and information of such former "application" for insurance by Orlando H. Couch.

The fifth paragraph of reply alleged that, within a few days after the death of Orlando H. Couch, appellee prepared all the proofs of death as she believed to be necessary under the terms of the policy sued upon and forwarded same to appellant; that appellant, after the receipt of said proofs of loss and with full knowledge of all the facts set out in its second answer, requested and required appellee to make additional affidavits and proofs of death, which she did at great expense and trouble, and that, although appellant was fully advised and knew all the matters set

up in its answer, it did not notify appellee until long after the receipt by it of said additional proofs that any objection would be made by it to the payment of said policy of insurance sued on herein, and did not until long after said time inform her of its refusal to pay any sum due thereon by reason of the matters set forth in its answer. Wherefore she says that appellant has waived its defense in this action, and ought to be estopped to defend on account of the matter set forth in the answer.

The appellant filed a demurrer for want of facts to the fourth paragraph of reply, which was overruled and exception saved. There was a trial by jury, which resulted in a verdict in favor of appellee for \$5,773.24. Appellee filed a remittitur for \$369.24, and judgment was rendered for \$5,414.

Appellant filed a motion for a new trial for the reasons that the verdict is not sustained by sufficient evidence, is contrary to law, and also because of alleged errors in the giving of certain instructions tendered by appellee, and in refusing to give certain instructions tendered by the appellant.

Appellee contends that the appellant has failed to have the record paged and indexed, and to have the marginal notes made as required by the rules 1. of this court, and that the appeal should be dismissed. There has been a substantial compliance with the rules in relation to the preparation of the record, and when that is done the cause will not be dismissed.

The first error assigned is that the court erred in overruling the demurrer to the fourth paragraph of appellee's reply. This paragraph of reply contains two purported avoidances of the answer: (1) That

the policy issued by the Monarch company contained a provision that after one year it should be incontestable, and that more than one year had passed after it was issued and before the death of the insured; and (2) that when the Monarch company issued its policy to Orlando H. Couch it knew that he had formerly made "applications" for insurance upon which policies had not been issued, and that appellant at the time it issued the policy sued upon had knowledge and information of such former "application" for insurance.

The insurance policies issued by the Monarch Company and the one sued upon, together with the applications for insurance, the medical examinations,

2. tions, health certificate and the reinsurance contract are all set out in the pleadings, so that it is a question of law whether the incontestable clause in the Monarch policy became a
3. part of the policy issued by the appellant.

Under the terms of the reinsurance contract, Orlando H. Couch, as a member of the Monarch company, was given a choice of two options: (1) To continue paying to the appellant the same premium for the same period as was theretofore to be paid by him to the Monarch company, and be thereafter insured against death in the appellant company for such an amount of insurance as the premiums paid by him to the appellant would purchase according to the table of rates set out in the reinsurance contract; (2) within one year to make a written application on the form prescribed by the appellant and by furnishing satisfactory evidence of insurability at the time of making such application to receive from appellant, free of expense, a choice of three policies for any desired

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amount within the limits fixed by the by-laws of the appellant, and for such new policy paying the rates applicable to his age at the time of becoming a member of the Monarch company. He chose the second option, entered into a new contract with the appellant, received a new policy insuring him against death, and no other contingency, and surrendered for cancellation his policy which had been issued by the Monarch company. The reinsurance contract expressly eliminated and excluded from the new policy "all benefits, privileges or conditions contained in the policy issued by the Monarch Life Indemnity Company other than the amount payable at death," which death benefit was made subject to the conditions expressed in the policy issued by the appellant.

The rights of the insured and the appellant were fixed by the terms of the policy issued by the appellant. The incontestability clause in the policy issued by the Monarch company had no bearing upon the policy sued upon; it was not made a part thereof, and did not bind appellant.

We next pass to that part of the reply relative to the former applications of Orlando H. Couch for insurance. According to the terms of the rein-

4.     insurance contract appellee's decedent was not required to undergo a medical examination in order to secure the policy in suit, but he was required to furnish "satisfactory evidence of insurability," at the time of making his application, and this he undertook to do by signing the statement hereinbefore set out, in which he "expressly warranted" that his application and the statements and medical examination made by him to the Monarch company for insurance are, and were when made, true, and if the same, or any

part of the same, were untrue, the policy applied for in the appellant company should be void.

When the insured made his application for membership in the Monarch company, he submitted therewith, and as a part thereof, a medical examination, wherein he was asked if he had ever been refused insurance in any company or order, to which he answered "No." Appellant's answer alleged that prior to said time he had made application for and had been refused insurance in two different companies, which facts were unknown to appellant when it issued the policy in suit.

It will be observed that the reply does not meet all the allegations of the answer. The language of the reply is that the defendant had knowledge and information of such former "application" for insurance made by Orlando H. Couch. If we should hold that it was the intention of the pleader to allege knowledge of both applications mentioned in the answer, the reply would still be subject to demurrer on account of the failure to allege that appellant had knowledge that insurance had been refused. *Supreme Tribe, etc. v. Lennert* (1912), 178 Ind. 122, 98 N. E. 115. There are other allegations in the answer to the effect that the insured was afflicted with certain diseases, including kidney diseases, at the time he made application for the policy in suit, and that he knew of his diseased condition, and that appellant, if it were possessed of such information, would not have issued the policy in question; that he fraudulently concealed such facts from appellant; that such diseases continued and caused his death. The reply also fails to respond to this part of the answer, and is subject to demurrer for that reason. The appellee makes no

attempt to uphold the reply, except on the theory that "a bad reply is good enough for a bad answer."

The appellee, in support of this theory, insists that the answer is not sufficient, because it does not allege that all the premiums received by the Monarch company had been tendered to appellee, and that the appellant did not give notice of its intention to rescind the contract, or make tender of the premiums within a reasonable time. The insured died April 30, 1914. Appellant, in its answer, alleges that it did not learn of the untruthfulness of the statements made by insured until August 10, 1914, when it notified appellee of its intention to rescind, and mailed her a check for the amount of the premiums paid; that appellee returned said check, without objection to the form of the tender, and filed her complaint in this action August 19, 1914; that, on November 30, 1914, appellant tendered to appellee \$201.62, that being an amount sufficient to cover the premiums paid to appellant, together with all interest thereon, and that the further sum of \$21.72, an amount sufficient to cover and pay all the costs of this action, was tendered to appellee; that appellee refused to accept said tender, and that thereupon said money was paid into court for the use of appellee.

The tender of the \$201.62, plus \$21.72 costs, made November 30, was, under the circumstances, made within a reasonable time, and was sufficient in

5-6. amount. This being true, it is not necessary for us to determine whether the mailing of the check was a sufficient tender. The appellant was not required to return any of the premiums paid to the Monarch company, but was required to return only the premiums which it had received from the insured, amounting to \$188.35.



The appellee next contends that the medical examination referred to in the answer contains no specification or stipulation of warranty, and is not

7. shown to have been made a part of the policy issued by the Monarch company, and that a breach of warranty cannot be based upon it.

It is not necessary that the medical examination should contain any stipulations of warranties, or that it should have been made a part of the policy issued by the Monarch company. It was made by the insured to the Monarch company, and in his application to the appellant he referred to this medical examination and warranted the statements in it to be true, thus making the said statement a part of his application for the policy sued upon. Under the conditions of the policy issued by appellant, a breach of warranty could be founded upon false statements made by the insured in his application to the Monarch company.

The answer alleged that at the time the insured made his application to the appellant for insurance he was not in sound health; that he was afflicted with certain diseases, which continued to exist and afterwards caused his death; that he had been examined by physicians, and was informed of his condition; that, for the purpose of obtaining the issuance of the policy sued upon, he fraudulently concealed said information, although he knew appellant would not issue the policy if it knew of his condition, and that appellant had no knowledge of his condition.

The health certificate, which was a part of his application presented to the appellants, contained the following statement:

“As a basis of and consideration for said new policy, I hereby submit and *warrant* that I am now in sound health, that there is no cause in connection with my physical condition that would be a bar to my securing life insurance or in any way shorten my life; that I have never suffered from” certain diseases, naming them.

Stipulations and conditions like these in an application are regarded in the nature of conditions precedent to the policy becoming effectual. The answer does not disclose the existence of a temporary ailment or indisposition not related to the permanent health of the insured, but rather to a serious and incurable condition of such a nature as to shorten his life, and antedating the application, and continuing without interruption thereafter until it terminated in his death.

The facts alleged show the existence of such a condition and such a breach thereof as rendered the policy void at the election of the insurer. *Ebner, Admr., v. Ohio, etc., Ins. Co.* (1918), 69 Ind. App. 32, 121 N. E. 315; *Metropolitan Life Ins. Co. v. Solomito* (1916), 184 Ind. 722, 112 N. E. 521.

The answer set out in full the express warranty of the insured that the statements and warranties contained in his application and medical examination to the Monarch company for insurance were true when made, and alleged that in said medical statement he falsely stated that he had never been refused insurance in any company or order; that he had prior thereto made application for insurance upon his life with the Hartford Life Insurance Company, and also with the Mutual Life Insurance Company of New York; that both of said applications had been re-

jected and refused prior to the time when he so answered said question; that said statements were warranties and material to the risk incurred by appellant in the policy sued upon; that appellant had no knowledge of the falsity of said answer, and would not have issued the policy if it had known that said answer was false.

Under the application and policy of insurance involved in this case, the insured warranted the truthfulness of his statement that he had never been

8. refused insurance. But, if this were treated as a representation, it would make no difference in our holding, for the answer alleges that his answer to said question was material to the risk, that it was false, and that its falsity was unknown to appellant.

A false answer by an applicant for insurance that he had never been rejected by, or refused insurance in, any other company, in the absence of waiver or estoppel, renders the policy voidable at the election of the insurer. *Supreme Lodge, etc. v. Miller* (1915), 60 Ind. App. 269, 110 N. E. 556; *Kelly v. Life Ins. Clearing Co.* (1896), 113 Ala. 453, 21 South. 361; *March v. Metropolitan Life Ins. Co.* (1898), 186 Pa. 629, 40 Atl. 1100, 65 Am. St. 887; *Finch v. Modern Woodman, etc.* (1897), 113 Mich. 646, 71 N. W. 1104; *Finn v. Metropolitan Life Ins. Co.* (1903), 70 N. J. Law 255, 57 Atl. 438; *American Life Ins. Co. v. Judge* (1899), 191 Pa. 484, 43 Atl. 374; *Security, etc., Ins. Co. v. Webb* (1901), 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122; *Webb v. Security, etc., Ins. Co.* (1903), 126 Fed. 635, 61 C. C. A. 383; *Home Life Ins. Co. v. Myers* (1901), 112 Fed. 846, 50 C. C. A. 544; *Nat. Life Assn. v. Hopkins* (1899), 97 Va. 167, 33 S. E. 539; *Moore v. Mutual, etc., Life Assn.* (1903), 133

Mich. 526, 95 N. W. 573; *Langdeau v. John Hancock, etc., Ins. Co.* (1907), 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190; *Clemans v. Supreme Assembly, etc.* (1892), 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Aetna Life Ins. Co. v. Moore* (1913), 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; *Prudential Ins. Co. v. Moore* (1913), 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367.

This is the rule even though the policy by its terms provides that such a statement shall be treated as a representation and not as a warranty. See *Ebner, Admr. v. Ohio, etc., Ins. Co., supra*, where this court had before it a policy which expressly made all statements in the application representations and not warranties. The court, speaking through Caldwell, J., said: "Knowing that he had made the application, he was bound to know that it had either been rejected or that it was pending, and, if pending, his answer was likewise false. \* \* \* His answer that no physician had within the last ten years expressed an unfavorable opinion concerning his health was untrue, and likewise his answer that he did not have at the time of the application, and that he never had had, any disease of the heart. Under a provision embodied in the incontestability clause as above set out, the statements now under consideration should be dealt with as representations rather than warranties. Their nature is such that they should be regarded as material to the risk. \* \* \* We then have a case of representations, false in fact and material to the risk. A material false representation is a ground for the avoidance of an insurance policy the same as any other contract. 14 R. C. L. 1021. Such a representation may be designated as a misrepresentation. A misrepresentation, as that term is used in its rela-

tion to insurance policies, is the statement of something as a fact which is untrue in fact, and which the assured states, knowing it to be untrue, with an intent to deceive the underwriter, or which he states positively as true, without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. *Daniels v. Hudson River Fire Ins. Co.* (1853), 66 Mass. (12 Cush.) 416; (59 Am. Dec. 192); *Clark v. Union, etc., Ins. Co.* (1860), 40 N. H. 333, 77 Am. Dec. 721; 14 R. C. L. 1021. Such a misrepresentation has the force and effect of a positive fraud."

If this be true in cases where the statements are to be treated as representations, there is certainly more reason for so holding in a case like the present where the contract makes them warranties.

Answers to questions propounded by an insurance company in an application for insurance will not be construed as warranties, unless they are clearly

9. shown by the form of the contract to have been so intended by the parties. But the parties have a right to make them warranties if they so desire, and when the contract so provides they must be literally true, or the insurance is voidable. A reading of the policy now under consideration and the application which is made a part of the policy leaves no doubt as to the intention of the parties. The statement, "I hereby *expressly warrant* \* \* \* that my application to said Monarch Life Indemnity Company and the statements and warranties contained in said application \* \* \* medical examination and health certificate made by me to said Monarch Life Indemnity Company are and were true when made,"

is as explicit as any language can make it, and makes it clear that a warranty was intended.

The appellant's answer was sufficient, and it was therefore error to overrule the demurrer to the fourth paragraph of reply.

The next assignment of error relates to the overruling of the motion for a new trial. It is claimed that the court erred in giving instructions Nos.

10. 8 and 18, given at the request of the appellee, and No. 3, given by the court on its own motion.

The appellee calls our attention to the fact that the appellant has not set out all the instructions given and insists that it is the duty of the court to refuse to consider any question as to whether or not there is error in giving or refusing said instructions, and cites *Chicago, etc. R. Co. v. Williams* (1907), 168 Ind. 276, 79 N. E. 442, and *Ellison v. Ryan* (1909), 43 Ind. App. 610, 87 N. E. 244, in support of that contention. The rule was formerly as stated by appellee, but since the decision in the case of *Simplex, etc., Appliance Co. v. Western, etc., Belting Co.* (1909), 173 Ind. 1, 88 N. E. 682, the rule has been otherwise. The rule now is that when an appellant desires to challenge the correctness of any of the instructions given, he must see that all of the instructions given are in the record, but it is only necessary that he set out in his brief those that he claims are erroneous. If there are other instructions given or tendered by appellant, which overcome the alleged error, it is the duty and privilege of the appellee to call our attention to them and to set them out in his brief.

We have examined the instructions about which complaint is made. There was no error in the giving of any of them.

The appellant contends that it tendered instructions numbered from 1 to 19, and that the court erred in refusing to give certain of them. The appellee

11. calls our attention to the fact that the record discloses that the bill of exceptions shows that appellant tendered instructions numbered 1 to 20, and that the record fails to show which were given and which refused. We have examined the bill of exceptions, and are of the opinion that appellee's point is well taken, and that no question is properly presented on the refusal of the court to give the instructions tendered.

The appellant also contends that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law.

The undisputed evidence shows that in 1911, and prior to the time when the insured applied to the Monarch company for insurance, he had applied to the Hartford Life Insurance Company and also to the New York Mutual Life Insurance Company, and that both of said companies had refused him insurance because of the condition of his health; that on September 21, 1911, he applied to the Monarch company for insurance and submitted to a medical examination, in which he stated that he had never been refused insurance by any company; that his said statement was false; that he knew it was false; that he signed and presented his application to the appellant company as alleged in the answer, wherein he warranted that all the statements made by him in his application and medical examination to the Monarch company were true; that the appellant, when it issued the policy sued upon, did not know that he had been refused insurance; that it relied on the truthful-

ness of his statements, and did not learn of the untruthfulness of his statement until August 10, 1914, when it elected to rescind the insurance contract, and, as we have heretofore stated, mailed a check to appellee for the amount of premiums paid to appellant, and afterwards tendered her a sufficient amount of money to pay such premiums, interest and costs, and afterwards paid the same into court for the use of appellee; that the insured died April 30, 1914; that proof of death was received by appellant May 8, 1914; that this proof of death consisted of an affidavit made by appellee in which she gave the cause of death as "chronic nephritis" (which is a disease of the kidneys); that she did not know how long the insured had had this disease, and that Charles N. Brown had been the attending physician of the deceased for the last five years. The affidavit of Dr. Brown as the attending physician was also made a part of the proof of death. His affidavit, dated May 5, 1914, stated that he had attended the deceased during his last sickness, and that the health of the deceased began to be affected about a year before. (The policy in question was issued October 1, 1913.) Dr. Brown also stated in his affidavit that he was first consulted by the insured concerning the disease which caused his death in September or October, 1913, and that, in his opinion, the deceased had been afflicted with such disease one year, and that the final illness was not complicated with or preceded by any other disease. On June 26, 1914, appellant wrote a letter to appellee calling her attention to the fact that her affidavit stated the cause of death to be "chronic nephritis," and that the insured's health first began to be affected about seven or eight months prior to his death, and



asking her to strengthen her memory to the utmost to indicate more exactly, if possible, when it became known to her or to the insured that he was afflicted with nephritis, and also calling her attention to the statements in the affidavit of Dr. Brown, and also asking her to favor appellant with her knowledge as to the condition of Mr. Couch's health for the last two or three years, and that she supply appellant with what information she had concerning applications which he had made for insurance in recent years. This letter ended by telling her that, when appellant received her reply, it would act promptly in disposing of her claim.

On July 8, 1914, appellant again wrote to appellee, saying that no reply had been received to the letter of June 26, requesting further information, and insisting that appellee give the information requested before appellant would make any definite disposition of the death claim, notwithstanding the threats made by her attorney to bring suit in case the claim was not paid before July 15. On July 16, appellant wrote a letter to J. L. Crouse, attorney for the appellee, acknowledging the receipt of his letter of the 11th instant, inclosing proofs of loss, and stating that additional affidavits which it deemed necessary were that day being mailed to appellee; that if, after a thorough review of all the available proofs, the appellant felt compelled to deny payment of the claim, it would frankly give him the reasons for so doing, and that if, on the other hand, it found that the proofs supported the claim, no time would be lost in making payment. The appellant had employed the Hooper Holmes Bureau to investigate the facts, and on July 14, received a letter to the effect that the bureau had

information to the effect that the insured was in bad health when he applied for the insurance, and that he had been rejected by two different companies. On July 16, appellant wrote to appellee to the effect that it had learned that her husband had been treated by Drs. Davis, Holliday and Greenleaf during the past three years, and inclosing blank affidavits with a request that she secure an affidavit from each of these physicians, and promising to make prompt disposition of the claim upon receipt of these affidavits. The appellee secured these three affidavits and mailed them to appellant some time in July. Appellant continued its investigations through the Hooper Holmes Bureau until August 10, 1914, when it wrote to appellee, giving her a full report of the facts disclosed by the investigation, informing her that it elected to rescind and cancel the policy, and inclosing her a check for the premiums paid to appellant. It also appears from the undisputed evidence that, after appellee received the letter of July 16, she secured the three affidavits called for; that her expenses in securing them were \$25, not including her personal expenses.

The claim of appellee that the appellant ought to be estopped is based upon the fact that, after it received the letter from the investigating bureau on

12. July 14, it called upon appellee for the affidavits of the three physicians, which she secured, and which cost her twenty-five dollars. The claim of appellee that appellant should be estopped cannot be upheld. When appellant requested that appellee secure these affidavits it informed her and her attorney that if, upon full investigation, her claim was found to be valid, it would be paid without delay, but

if it was determined otherwise, she would be frankly informed of the facts and the reasons why it would not be paid. Appellee and her attorney both knew that appellant was investigating the facts connected with the application for insurance, and that the validity of the policy would probably be contested. Appellee is therefore in no position to claim that she was misled by appellant.

An insurance company is estopped to declare a forfeiture of an insurance contract, if, with full knowledge of the facts, it states to the beneficiary, or

13. causes the beneficiary reasonably to believe that the insurance company does not intend to stand upon the right of forfeiture, and with such representations and actions causes the beneficiary to do any act entailing expense and trouble, upon the belief that the company has waived the right of forfeiture. No such state of facts is shown to exist in this case. There is no evidence that appellee was misled by anything that appellant did, or that appellant did anything which can be construed as a waiver or estoppel.

The statement of the insured that he had never been refused insurance was a warranty, and, as such, must be absolutely and literally true. Such a

14. statement cannot be deviated from in the smallest particular. Its falsity is sufficient to void the policy. *Catholic Order, etc. v. Collins* (1912), 51 Ind. App. 285, 99 N. E. 745.

Our conclusion is that the verdict is not supported by the evidence, and is contrary to law. The court therefore erred in overruling the motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial, to sustain the demurrer to

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City of Terre Haute v. Burns—70 Ind. App. 712.

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the fourth paragraph of reply, and for further proceedings not inconsistent with this opinion.

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CITY OF TERRE HAUTE v. BURNS.

[No. 9,279. Rehearing denied October 25, 1917. Transfer denied December 17, 1918.]

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Robert M. Burns against the city of Terre Haute. From a judgment for plaintiff, the defendant appeals. *Reversed.*

For former opinion, see 69 Ind. App. 7.

FELT, J.—Appellee insists that a rehearing should be granted and that the judgment should be affirmed for several alleged reasons, the principal ones being as follows: (1) That this court erred in holding that Don M. Roberts was the *de facto* city civil engineer and (2) in holding that a *de jure* officer cannot recover the salary attached to the office from the municipality under which he holds such office, for a period of time during which the office was held by a *de facto* officer who discharged the duties of the office and received the salary for the period in controversy.

The original opinion clearly states that there is a conflict of authority on the latter proposition and cites authorities supporting both views. We have reviewed many of the decisions and are content with the conclusion reached and announced in the original opinion.

However, appellee now contends that such conclusion is in conflict with the decision of the Supreme Court in the case of *State, ex rel. v. Carr* (1891), 129 Ind. 44, 28 N. E. 88, 28 Am. St. 163, 163.

This case received careful consideration when the opinion was written and we have again examined it to determine whether we were right in the conclusion then reached that the facts of that case on which the opinion is based are so radically different from those of the case at bar that it is not a precedent we should follow in this case. As to the questions actually decided there is no necessary conflict in the two decisions. Opinions are to be read and considered in the light of the facts on which they are based and the questions actually presented to and decided by the court. What is said

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Board, etc. v. Boland, Admr.—70 Ind. App. 713.

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beyond that is mere *obiter dicta*, is not an essential part of the opinion, does not amount to a decision of the question discussed, and is binding on no one.

In the case at bar appellee did not have possession of the office or discharge the duties thereof. In the Worrell-Carr case, *supra*, Worrell was not only the *de jure* officer but he was in actual possession of the office provided by the proper authorities and discharged duties pertaining thereto during the period for which he claimed the right to receive the emoluments of the office, which facts clearly appear from the opinion. *State, ex rel. v. Carr, supra*, 45, 49.

That a decision may work a hardship on some individual is always to be regretted, but it affords no excuse for refusing to follow sound legal principles in rendering a decision. This proposition has peculiar force when applied to a case like the one at bar for the reason that it affects the general public and may indirectly interfere with the prompt and efficient discharge of the duties of public officials.

We find no reason for departing from the conclusions announced in the original opinion. The petition for a rehearing is therefore overruled.

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CHILDS ET AL. v. GOETCHEUS, TRUSTEE, ET AL.

[No. 9,747. Filed April 25, 1919.]

From Delaware Superior Court; *Harry H. Orr*, Special Judge.

Action between James Roy Goetcheus, trustee, and others, and Laura B. Childs and another. From the judgment rendered, the latter appeal. *Affirmed*.

*Timothy S. Owen*, for appellants.

*McClellan, Hensel & Guthrie*, for appellees.

PER CURIAM.—Judgment affirmed.

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BOARD OF COMMISSIONERS OF THE COUNTY OF MADISON  
v. BOLAND, ADMINISTRATOR.

[No. 9,908. Filed June 5, 1919.]

From Delaware Superior Court; *Robert W. Van Atta*, Judge.

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Hammerton v. J. R. Watkins Medical Co.—70 Ind. App. 714.

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Action between the Board of Commissioners of the County of Madison and Daniel L. Boland, executor of the estate of William Boland, deceased. From the judgment rendered, the former appeals. *Appeal dismissed.*

*Walter Vermillion*, for appellant.

*Leffler, Ball & Needham* and *Bagot & Free*, for appellee.

PER CURIAM.—Appellant's brief in this case is in substantially the same condition as was the brief in the cause of *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and the brief in the cause of *Curry v. City of Evansville* (1914), 56 Ind. App. 143, 104 N. E. 978. On authority of those cases, this appeal is dismissed.

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HAMMERTON ET AL. v. J. R. WATKINS MEDICAL COMPANY  
ET AL.

[No. 9,894. Filed June 19, 1919.]

From Jasper Circuit Court; *William H. Parkinson*, Special Judge.

Action between the J. R. Watkins Medical Company and others and George H. Hammerton and others. From the judgment rendered, the latter appeal. *Affirmed.*

*John A. Dunlap*, for appellants.

*James H. Chapman* and *Towney, Smith & Towney*, for appellees.

REMY, J.—The questions presented by the record herein are substantially the same as those involved in the case of *Hammerton v. J. R. Watkins Medical Co.* (1918), 68 Ind. App. 515, 120 N. E. 710, and upon authority of that case the judgment is affirmed.

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[NOTE.—The citation *Neher v. Kerr*, 363, 365 (1) indicates that the opinion begins on page 363, that the point cited is on page 365, and that the point is numbered 1 in the margin.—REPORTER.]

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## ACCORD AND SATISFACTION—

1. *Compromise and Settlement.—Unliquidated Claims.—Tender of Check in Full Payment.—Acceptance.*—Where there is a *bona fide* dispute between two parties as to the amount due and owing from one to the other on an unliquidated claim and the debtor tenders a negotiable bank check in full payment and settlement of the amount which he claims is due, and the creditor accepts and cashes it without objection, there is payment and discharge of the account in full. *Neher v. Kerr*, 363, 365 (1).

2. *Compromise and Settlement.—Unliquidated Claims.—Tender of Check in Full Payment.—Acceptance.*—Where, on the arrival of a quantity of logs, the buyer called the seller on the telephone and informed him that he would not receive the logs because they were under size and defective, and the seller ordered the buyer to unload the logs, stating that he would make it all right with the buyer, there was an unliquidated claim, and, there being a good-faith dispute concerning the amount due thereon, the accepting and cashing by the seller of a check sent by the buyer in full payment of the claim operated as an accord and satisfaction. *Neher v. Kerr*, 363, 366 (2).

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**APPEAL.**

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**I. DECISIONS REVIEWABLE.**

1. *Dismissal of Cause.*—An order of court dismissing a cause is a final judgment from which an appeal may be taken.

*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 216 (1).

2. *Dismissal of Application to Set Aside Default Judgment.*—An order that an application and motion filed under §405 Burns 1914. §306 R. S. 1881, "be, and the same is now and hereby dismissed," put an end to the controversy between the parties as far as could



## APPEAL—Continued.

be done by the trial court, and was a final judgment from which an appeal lies.

*Indiana Travelers', etc., Assn. v. Doherty*, 214, 217 (2).

## II. PRESENTATION AND RESERVATION IN TRIAL COURT OF GROUNDS OF REVIEW.

3. *Evidence.—Motion to Strike Out.—Necessity of Objections.*—Where a witness was permitted to testify without objection, the overruling of a motion to strike out the testimony presents no question for review on appeal.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 330 (8).

4. *Judgment.—Exceptions.—Necessity.*—Where the judgment is proper in form and in substance as measured by the verdict or finding, the question of its correctness, as measured by the cause and procedure, is tested by exceptions reserved to rulings preceding the rendering of judgment, and properly presented.

*Zollman v. Baltimore, etc., R. Co.*, 395, 399 (2).

5. *Judgment.—Exceptions.—Necessity.*—Where the verdict was in general terms in favor of defendant, judgment that plaintiff take nothing, and that defendant recover costs, would follow as a matter of course, and no exception to the judgment was required in order that plaintiff be protected in his rights.

*Zollman v. Baltimore, etc., R. Co.*, 395, 399 (1).

6. *New Trial.—Necessity of Objections.—Instructions.*—Objections to the giving of instructions will not be considered on appeal where the appellant failed to assign error thereon as a ground for new trial.

*Irvine v. Baxter Stove Co.*, 105, 108 (2).

7. *Ruling on Motion to Modify Judgment.—Findings.—Failure to Challenge.*—In an action to quiet title, defendant's motion to modify the judgment by decreeing it entitled to an improvement lien on the land in controversy was properly overruled, where there was no motion for a new trial, so that the findings of the trial court must be taken as full, true and complete, and no finding was made which would have warranted the court in rendering the decree sought by defendant.

*Sheehan Construction Co. v. Kuhn*, 459, 462 (3).

8. *Ruling on Motion for New Trial.—Specifications.—Sufficiency.*—A specification in a motion for new trial that "the verdict of the jury is contrary to law and the evidence," is not a ground for new trial under the statute and presents no question for review.

*Oathcart v. Brewer, Gdn.*, 304, 306 (2).

9. *Ruling on Motion for New Trial.—Specifications.—Instructions.—Exception in Gross.—Availability.*—Where defendant specified, as a ground for new trial, that the court erred in giving instructions Nos. 1 to 25, and in giving each of such instructions, an exception that "to the giving of said instructions the defendant excepts," was in gross and not available, in the absence of any claim that all of the instructions were bad.

*Oathcart v. Brewer, Gdn.*, 304, 306 (3).

10. *Presenting for Review.—Objections to Evidence.—Briefs.*—To present for review the rulings of the court in admitting certain evidence, the appellant's brief must disclose the specific objections made to such evidence at the time of the ruling; objections thereto in the motion for new trial, without a showing that the same were presented at the time of the ruling, present no question.

*Irvine v. Baxter Stove Co.*, 105, 110 (5).

**APPEAL—Continued.**

11. *Presenting Questions for Review.—Conclusions of Law.—Necessity of Exceptions.*—It was not error for the trial court to overrule a motion to modify the conclusions of law, since there is no rule of practice authorizing such a motion, the appropriate remedy being by exceptions to the conclusions.  
*Sheehan Construction Co. v. Kuhn*, 459, 461 (2).
12. *Presenting Questions.—Refusal of Court to Require Witness to Testify.*—The court on appeal cannot determine whether the trial court's refusal to require a witness to answer questions propounded to him was harmful, even if erroneous, where the complaining party failed to make any statement of what he expected to prove by such witness.  
*Caldwell v. Alley*, 313, 323 (6).
13. *Questions Presented.—Correctness of Instructions.*—Where the exception taken to the instructions was joint, and it is admitted on appeal that some of those given were correct, no question is presented for review as to the instructions.  
*Indianapolis, etc., Traction Co. v. Hardwick, Adm.*, 192, 199 (7).
14. *Questions Reviewable.—Ruling on Demurrer.—Failure to Take Exception.*—The overruling of a demurrer cannot be reviewed on appeal, where no exception to the ruling was taken.  
*W. T. Rawleigh Co. v. Hughes*, 127, 129 (2).
15. *Questions Reviewable.—Failure to Take Exception.*—The action of the trial court overruling a motion to strike out the name of a party defendant, and in denying a motion to strike out paragraphs of answer, cannot be reviewed on appeal, where no exceptions are shown to have been taken to such rulings.  
*W. T. Rawleigh Co. v. Hughes*, 127, 129 (3).

**III. PARTIES.**

16. *Separate Judgment.*—Where the only issue against one party to the trial was tendered by plaintiff in his complaint and there was a separate judgment in favor of such party from which no appeal was taken, and he was not a party to the judgment appealed from, such party would not be affected by the result of the appeal, and is not a necessary party thereto.  
*Boyd v. Greer*, 77, 80 (1).

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17. *Term-Time Appeal.—Bond.*—A term-time appeal will not be dismissed on appellee's motion on the ground that, on the overruling of appellant's motion for new trial, no time was fixed by the trial court in which to file an appeal bond, and no surety was named or indicated by the court at that time, where the record shows that, when the motion for new trial was overruled, appellant reserved an exception and prayed an appeal, which was granted, and that on a later day in the same term, the court approved and filed an appeal bond tendered by appellant.  
*King Piano Co. v. Brent*, 643, 644 (1).

**V. RECORD—PREPARATION AND CONTENTS.**

See also EXCEPTIONS, BILL OF.

18. *Admissions of Counsel.*—Admissions or statements of counsel as to matters which do not otherwise appear in the record will not be considered by the court on appeal.  
*Price v. Mitchell*, 671, 672 (1).

## APPEAL—Continued.

19. *Bill of Exceptions.—Approval and Filing.*—Where the bill of exceptions containing the evidence was not filed during the term at which the motion for a new trial was overruled, nor within the time given beyond such term for that purpose, nor presented to the judge of the trial court for his approval within such time, the bill is not part of the record.  
*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 487 (4).
20. *Bill of Exceptions.—Conclusiveness.*—A vacation entry that the bill of exceptions containing the evidence was presented to the judge on a certain day is controlled by a recital in the bill that it was presented at an earlier day, there having been no steps taken to correct the error, if any, in the bill.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 402 (5).
21. *Bill of Exceptions.—Filing.—How Shown.*—The filing of a bill of exceptions cannot be shown on appeal by the file mark of the clerk thereon alone.  
*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 340 (4).
22. *Bill of Exceptions.—Filing.*—A purported bill of exceptions embodied in the transcript cannot be considered a part of the record, unless it appears that it was duly filed, which must be shown either by an order-book entry or by the certificate of the clerk of the trial court, and that such filing was made during the term at which the motion for a new trial was overruled, or within a time given beyond such term for that purpose.  
*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 338 (1).
23. *Bill of Exceptions.—Sufficiency.—Failure to Include All the Evidence.—Scope of Review.*—Where a bill of exceptions purporting to contain all the evidence shows on its face that a contract not appearing in the bill was read in evidence, the court on appeal cannot determine a question requiring a consideration of the evidence.  
*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 488 (5).
24. *Bill of Exceptions.—Sufficiency.—Failure to Incorporate All the Evidence.—Questions Reviewable.*—Where the bill of exceptions fails to disclose the contract out of which it is alleged that plaintiff's claim arose, or any fact from which the trial court could determine whether anything was due plaintiff as interest, the court on appeal is unable to ascertain whether the contract provided for interest, and cannot determine the contention that the trial court erroneously failed to include interest in the amount of recovery.  
*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 489 (7).
25. *Bill of Exceptions.—Time of Signing and Filing.—Presumption.*—Although it is essential to the validity of a bill of exceptions that it be filed after, rather than before, it has been signed, yet where it appears that there was no default respecting the time of filing and that the bill was filed on the day it was signed, the latter act is presumed to have preceded the former.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 403 (7).
26. *Bill of Exceptions.—Time for Filing.*—Where a bill of exceptions containing the evidence discloses that it was presented to the judge within the ninety days allowed for filing, that is sufficient, although the bill was not filed until after the expiration of the ninety days. *Zollman v. Baltimore, etc., R. Co.*, 395, 401 (4).
27. *Change of Venue.—Failure to Authenticate Paragraphs of Complaint.—Questions Presented.*—Where, upon a change of

## APPEAL—Continued.

venue being taken, the clerk of the court in which the action originated failed to certify or authenticate paragraphs of complaint, they were not in the record, and assignments of error on rulings on motions and demurrers addressed thereto present no questions for review on appeal.

*McOllen v. Sekker*, 435, 436 (1).

28. *Instructions.—Authentication.*—Where instructions tendered by appellant are not authenticated in any manner as required by the statute, they have no legitimate place in the record, and are not presented for consideration on appeal.

*Cathcart v. Brewer, Gdn.*, 304, 307 (5).

29. *Instructions.—Filing.—Bill of Exceptions.*—Where a bill of exceptions discloses that it is proper in form and substance, and that it contains all the instructions that were tendered and refused, etc., and it appears from an order-book entry that the bill was filed on the day that the trial closed, the filing of the bill was a sufficient filing of the instructions to make them part of the record.

*Zollman v. Baltimore, etc., R. Co.*, 395, 402 (6).

30. *Instructions.—Incorporating in Record.—Method.*—The various other statutory methods of making instructions a part of the record in a civil action are not exclusive of the method by bill of exceptions.

*Zollman v. Baltimore, etc., R. Co.*, 395, 403 (8).

31. *Præcipe.*—Where a written præcipe for a transcript is filed calling for less than the entire record, only such papers and entries as are mentioned therein are properly a part of the record on appeal.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 341 (9).

32. *Presenting Questions for Review.—Evidence.*—Where each of the questions presented for review on appeal requires for its determination a consideration of all the evidence, and the bill of exceptions affirmatively shows that the evidence is not all in the record, the judgment of the trial court is conclusive.

*Kipfer v. Polson*, 49.

33. *Presenting Questions for Review.—Instructions.—Brief.—Duty of Appellee.*—When an applicant desires to challenge the correctness of any instructions given, he must see that all of the instructions given are in the record, but it is only necessary that he set out in his brief those that he claims are erroneous, and if there are other instructions given or tendered by appellant which overcome the alleged error, it is the duty of the appellee to call the court's attention to such instructions and to set them out in his brief.

*Western Indemnity Co. v. Couch*, 684, 706 (10).

34. *Presenting Questions for Review.—Refusal of Instructions.—Failure to Identify.*—Where appellant contends that it tendered instructions numbered from 1 to 19, and that the court erred in refusing to give certain of them, but the record discloses that the bill of exceptions shows that appellant tendered instructions numbered 1 to 20, and does not show those given and refused, no question is presented on appeal.

*Western Indemnity Co. v. Couch*, 684, 707 (11).

35. *Questions Reviewable.—Assignments of Error.*—Where the only error assigned on appeal is the action of the court in overruling the motion for a new trial, and the only grounds therefor alleged therein require a consideration of the evidence, which is not in the record, no question is presented for review.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 342 (12).

**APPEAL—Continued.**

36. *Questions Reviewable.—Evidence.—Bill of Exceptions.*—In order to have the evidence considered on appeal, the bill of exceptions in the record must show that it contains all the evidence.  
*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 342 (11).
37. *Questions Reviewable.—Judgment.—Inadequate Recovery.—Failure to Incorporate Evidence.*—As the determination of the question whether interest should have been included in the amount of recovery requires a consideration of the evidence, such question cannot be determined in the absence of the evidence from the record.  
*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 487 (2).
38. *Questions Presented.—Peremptory Instructions.—Bill of Exceptions.*—Where no exception was taken to the giving of a peremptory instruction, but it appears from the record that the bill of exceptions containing the instruction, duly signed by the trial judge, was presented and filed within the time given for filing bills, though not filed until after the praecipe, there was a good-faith effort to comply with the rules of court, and questions arising on the instruction will be reviewed on appeal.  
*Caldwell v. Alley*, 313, 319 (1).
39. *Questions Reviewable.—Ruling on Demurrer.*—No question is presented for review as to the ruling on the demurrer to a paragraph of complaint, where the record contains only a copy of such paragraph made from the office copy of counsel in the case, and the record does not show that such substitution was authorized by the trial court under the provisions of §388 Burns 1914. §379 R. S. 1881. *Mackey v. Lafayette, etc., Trust Co.*, 59, 61 (1).
40. *Rules of Court.—Substantial Compliance.*—Where there has been a substantial compliance with the rules of court requiring appellant to have the record paged and indexed and to have marginal notes made, the appeal will not be dismissed for failure to comply with the rules.  
*Western Life Indemnity Co. v. Couch*, 684, 696 (1).
41. *Sufficiency.—Bringing Matters into Record.—Affidavit.*—The statement in an affidavit filed with the motion for new trial that the court had stated in the jury's presence that it would limit by instruction the application of certain evidence, is insufficient to excuse the appellant's failure to tender an instruction for that purpose, since such matter cannot be brought into the record by affidavit.  
*Irvine v. Baxter Stove Co.*, 106, 111 (7).

**VI. ASSIGNMENTS OF ERROR.**

See also 35; NEW TRIAL 1.

42. *Causes for New Trial.*—Attempted assignments of error which, if proper at all, deal with matters that should be assigned as grounds for a new trial, present no questions on appeal.  
*Federal Life Ins. Co. v. Mazam*, 266, 286 (7).
43. *Matters Assignable.—Refusal to Direct Verdict.*—Errors assigned on the refusal of the trial court to direct a verdict present no question for review on appeal.  
*Michigan Central R. Co. v. Kosmowski*, 145, 147 (1).
44. *Matters Reviewable.—Assignments Not Involved in Judgment.*—Assignments of error not involved in the judgment rendered cannot be considered on appeal.  
*Central Bank, etc. v. Martin*, 387, 394 (7).

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45. *Questions Presented.—Ruling on Demurrer.—Briefs.*—No question is presented for review on appeal by an assignment of error in overruling a demurrer, where neither the demurrer nor the memorandum filed therewith is set out in appellant's brief.  
*Baltes v. Armour Leather Co.*, 233, 235 (1).

**VII. BRIEFS.**

See also 10, 33, 65, 107, 108.

45. *Amendment.*—Where, after the filing of the appellee's brief, the appellant by leave of court amended his brief by inserting a copy of the motion for new trial, the omission to include the motion or its substance in the original brief was cured.  
*Irvine v. Baxter Stove Co.*, 105, 108 (1).
46. *Presenting Questions for Review.—Failure to Show Filing of Instructions.*—Where it does not appear from appellant's brief that the instructions were filed with the clerk, they are not in the record, and the omission cannot be supplied in the reply brief.  
*Indianapolis, etc., v. Traction Co. v. Hardwick, Adm.*, 192, 199 (6).
47. *Presenting Questions for Review.—Competency of Witness.*—Appellant's contention that the court erred in permitting a witness to testify cannot be sustained, where appellant's brief fails to show that any objection was made to the witness testifying, that the court made any ruling in relation thereto, or that any exception was taken.  
*Cathcart v. Brewer, Gdn.*, 304, 307 (4).
48. *Questions Presented.—Motion for New Trial.*—Questions raised under the motion for new trial will be considered on appeal, although the motion is not set out in full in appellant's brief, where the substance of the grounds relied on is set out.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 403 (10).
49. *Questions Reviewable.*—The trial court's ruling on a motion to strike out paragraphs of answer cannot be reviewed, where the motion is not set out in the brief.  
*W. T. Rawleigh Co. v. Hughes*, 127, 129 (4).
50. *Questions Reviewable.*—Under Rule 22 of the Appellate Court, requiring that appellant's brief be so prepared that all questions presented by the assignment of errors can be determined by an examination of the brief, without resort to the transcript, the court on appeal cannot review the overruling of a demurrer, where it is not stated or shown in the brief that any specific objection or memorandum was filed with the demurrer.  
*W. T. Rawleigh Co. v. Hughes*, 127, 129 (1).
51. *Questions Reviewable.*—The ruling of the trial court denying a motion for new trial cannot be reviewed on appeal, where appellant, although indicating where the motion can be found in the record, fails to set it out in its brief.  
*W. T. Rawleigh Co. v. Hughes*, 127, 130 (5).
52. *Questions Reviewable.*—Where neither the motion to make the complaint more specific, the complaint itself, nor the demurrer to the complaint or memorandum required to be filed therewith are set out in the appellant's brief, error assigned on the overruling of the motion and demurrer presents no question for review on appeal.  
*Krabbe v. City of Lafayette*, 428, 430 (1).
53. *Questions Reviewable.—Failure to Set Out Instructions.*—Where none of the instructions given or refused, of which complaint is made, are set out in appellant's brief, as required by

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rules of the Appellate Court, no question is presented for review on appeal by error assigned on the giving or refusal of such instructions. *Krabbe v. City of Lafayette*, 428, 431 (2).

54. *Questions Presented*.—Any question with reference to the action of the trial court in overruling the motion to modify the judgment is waived by appellant's failure to set out the motion or the substance thereof, and by failure to state any specific point thereon, as required by the rules governing the preparation of briefs. *Cassidy v. Ward*, 550, 553 (1).

55. *Sufficiency*.—Where appellant's briefs, regardless of criticism respecting form and substance, are sufficient to present a number of questions on the merits of the case, such questions will be considered. *Zollman v. Baltimore, etc., R. Co.*, 395, 404 (11).

56. *Sufficiency—Questions Presented*.—Where the first four propositions in appellant's brief under the heading "Points and Authorities" are so worded and grouped that the court can readily understand that they all relate to the assignment of errors relative to the overruling of the motion for a *venire de novo*, held that such propositions are sufficient to require the court on appeal to pass upon that question. *Brehm v. Hennings*, 625, 627 (2).

57. *Sufficiency—Failure to Include All Instructions—Duty of Appellee*.—Appellant is required to set out in his brief only the instructions with respect to the giving or refusal of which he complains, and if the alleged errors therein are obviated by other instructions given, it is the duty of appellee to bring that fact to the court's attention. *Zollman v. Baltimore, etc., R. Co.*, 395, 413 (20).

58. *Waiver of Error*.—Where appellant failed to mention, under the points and authorities in its brief, any of the instructions tendered by it and refused, error, if any, in such refusal is waived. *Reserve Loan Life Ins. Co. v. Sumner*, 472, 480 (4).

59. *Waiver of Error*.—Where defendant, although assigning excessive damages as a ground for new trial, fails to state any proposition or point on that subject under the points and authorities in its brief, the question is waived. *Washburn-Crosby Co. v. Cook*, 463, 470 (9).

60. *Waiver of Error*.—Grounds for a new trial are waived by appellant's failure to refer to them in his brief under his statement of points and authorities. *Krabbe v. City of Lafayette*, 428, 431 (3).

61. *Waiver of Error*.—Questions presented in a motion for new trial are waived where appellant fails to state in his brief any proposition or authorities to sustain them. *Cathcart v. Brewer, Gdn.*, 304, 306 (1).

62. *Waiver of Error*.—Causes for new trial to which appellant fails to make any specific reference in its proposition or points, as required by the rules governing the preparation of briefs, are waived. *Vandakka R. Co. v. Fry*, 85, 93 (10).

**VIII. REVIEW.****(A) SCOPE AND EXTENT.**

See also 23, 80, 81.

63. *Instructions—Consideration as a Whole*.—In order to determine whether instructions are misleading, they must be considered as a whole, and not in detached portions. *Vandakka R. Co. v. Fry*, 85, 89 (5).

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64. *Issues Not Raised by Pleadings.*—Where, in an action to foreclose a mortgage on land, plaintiff appellant did not allege that she had a vendor's lien on the land involved, and cross-complainant did not present any such issue but alleged that his mortgage was senior to that of plaintiff, thereby raising only the question of the priority between the two mortgages, appellant's contention that she had a vendor's lien was outside the issues presented and determined in the trial court and cannot be considered on appeal. *Cassidy v. Ward*, 550, 558 (6).
65. *Point not made in Original Brief.*—The court on appeal should not be required to consider a point not made in appellee's original brief. *Nickerson v. Hoover, Admr.*, 343, 362 (13).
66. *Questions Not Necessary to Decision.*—The instructions being properly in the record, it is not necessary for the court on appeal to determine whether they were made part of the record by other methods attempted, or whether the statute was complied with in that respect.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 403 (9).
67. *Questions Not Necessary to Decision.*—Where appellant did not avail himself of extended time granted on application under §661 Burns 1914, Acts 1911 p. 193, for filing bill of exceptions, the sufficiency of the notice of the hearing on the application or service thereof need not be determined on appeal.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 401 (3).
68. *Ruling on Demurrer.—Statute.*—Where the issue of contributory negligence is not mentioned in memorandum accompanying the demurrer to the complaint, it need not, under the terms of §344 Burns 1914, Acts 1911 p. 415, be considered in passing upon the sufficiency of the pleading.  
*Indianapolis, etc., Traction Co. v. Helms, Admx.*, 137, 142 (2).
69. *Ruling on Demurrer.—Statute.*—Under §344, cl. 6, Burns 1914, Acts 1911 p. 145, objections to the sufficiency of the complaint presented in appellant's brief, but not specified in the memorandum filed with the demurrer, cannot be considered on appeal.  
*Deep Vein Coal Co. v. Ward, Admx.*, 161, 164 (1).
70. *Ruling on Motion for Judgment on Interrogatories.*—In determining the correctness of the action of the trial court in overruling defendant's motion for judgment on the interrogatories, the court on appeal can consider only the complaint, answer, general verdict and answers of the jury to the interrogatories.  
*Kingan & Co. v. Albin, Admx.*, 493, 496 (1).
71. *Ruling on Motion for Judgment on Interrogatories.*—In determining whether the trial court erred in overruling motion for judgment on interrogatories, the court on appeal will consider only the complaint, the general verdict, and the interrogatories, together with the answers thereto.  
*Home Brewing Co. v. City of Indianapolis*, 674, 679 (1).
72. *Sufficiency of Evidence.—Presumptions.*—Every reasonable presumption, inference and intentment will be indulged in support of the general verdict, and in determining whether the evidence sustains it the court on appeal will consider only the evidence more favorable to appellee.  
*Chicago, etc., R. Co. v. Wesolowski, Admx.*, 5, 9 (3).
73. *Theory of Case.—Effect on Appeal.*—Where a complaint was susceptible of the theory adopted by the trial court, such theory will be adhered to on appeal, and, before a judgment



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may be sustained on the complaint, it must appear that the plaintiff is entitled to the relief granted on such theory, since a party may not sue upon one theory and recover upon another.

*Rembarger v. Losch*, 98, 102 (2).

**(B) PARTIES ENTITLED TO ALLEGE ERROR.**

74. *Instructions.—Invited Error.*—Error, if any, in instructions is not available to appellant, where the erroneous instructions were invited by appellant's evidence, together with its request for instructions, tendered by it, which pertained to the same subject as those complained of.

*Chicago, etc., R. Co. v. Wesolowski, Admz.*, 5, 10 (5).

75. *Instructions.—Invited Error.*—Appellant cannot complain that instructions were erroneous as not being warranted by the evidence, where such instructions were invited by others on the same subject tendered by appellant.

*Michigan Central R. Co. v. Kosmowski*, 145, 156 (10)

**(C) PRESUMPTIONS.**

See also 25, 72, 89.

76. *Answers to Interrogatories.—General Verdict.*—In passing on a motion for judgment on the answers to interrogatories all presumptions are in favor of the general verdict, if the pleadings will admit evidence to overcome the answers.

*Indianapolis, etc., Traction Co. v. Hardwick, Admz.*, 192, 198 (4).

77. *Complaint.—Omission of Material Averments.*—The court on appeal will assume that any omission of a material averment of the complaint was cured by the evidence.

*Valdenaire v. Henry*, 68, 70 (2).

78. *Ruling on Demurrer.—Law of Foreign State.*—Where a seller intervened in an insolvent buyer's receivership proceedings to recover possession of certain machinery sold under a conditional contract of sale, it will be assumed, in reviewing the overruling of a demurrer to a paragraph of answer to intervenor's petition drawn on the theory that the sale contracts were governed by the laws of Illinois, that the common law as interpreted and applied in Indiana, prevails in that state, except as otherwise alleged.

*Chalmers & Williams v. Surprise, Rec.*, 646, 655 (4).

**(D) QUESTIONS OF FACT, VERDICTS AND FINDINGS.**

See also 72, 76.

79. *Evidence.—Sufficiency.*—Where the vendor intervened in an insolvent buyer's receivership proceedings to recover certain machinery sold under a conditional sale contract, evidence held insufficient to sustain trial court's finding denying petitioners right of possession.

*Chalmers & Williams v. Surprise, Rec.*, 646, 658 (6)

80. *Evidence.—Scope of Review.*—In an action for wrongful death, where plaintiff's decedent was killed in a collision between an automobile in which he was riding and defendant's electric interurban car, a substantial contradiction in the evidence as to the speed at which the car was traveling presented such a conflict in the evidence as to prevent the court on appeal from reviewing it.

*Chicago, etc., R. Co. v. Wesolowski, Admz.*, 5, 8, (2).

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81. *Evidence.—Sufficiency.—Scope of Review.—Weighing Evidence.*—In determining whether findings are supported by sufficient evidence, the court on appeal need only consider such evidence as tends to support the findings, and conflicting oral evidence will not be weighed.  
*Wells Fargo & Co., v. First Nat. Bank, etc.*, 584, 589 (1).
82. *Findings.—Conclusiveness.*—A finding by the trial court is conclusive on appeal where there is evidence to support it.  
*Cleveland, etc., R. Co. v. Partlow*, 616, 624 (7).
83. *Judgment.—Weight and Sufficiency of Evidence.*—The decision of the trial court must be sustained, if it is supported in its material aspects by any competent evidence, although there may be other evidence from which a different conclusion might have been reached.  
*Cassidy v. Ward*, 550, 553 (2).
84. *Verdict.—Conclusiveness.*—A finding of the jury based on conflicting evidence is conclusive on appeal.  
*Delaski v. Kovacich*, 203, 203 (1).
85. *Verdict.—Evidence.—Inferences.*—In determining the sufficiency of the evidence on appeal, every inference reasonably deducible therefrom will be indulged to support the verdict.  
*Scottish, etc., Ins. Co. v. B. E. Linckenhelt & Co.*, 324, 327 (3).
86. *Verdict.—Evidence.—Sufficiency.*—In an action for wrongful death, where the sufficiency of a paragraph of complaint based on the last clear chance doctrine was not seriously challenged, and there was evidence to sustain its allegations, the verdict for plaintiff must be upheld as against defendant's contention that decedent's injury was proximately caused by his own negligence, there being evidence tending to sustain each of the other paragraphs of the complaint.  
*Indianapolis, etc., Traction Co. v. Helms, Admr.*, 137, 144 (5).
87. *Verdict.—Evidence.—Sufficiency.*—A verdict is sustained by sufficient evidence, as against objection on appeal, where there is legal evidence supporting every essential fact necessary to appellee's right of recovery.  
*Irvine v. Baxter Stove Co.*, 105, 112 (8).
88. *Verdict.—Answers to Interrogatories.*—In determining whether the jury's answers to interrogatories are sufficient to overthrow the general verdict, the court on appeal must accept the answers as being true.  
*Kingan & Co. v. Albin, Admr.*, 493, 504 (6).
89. *Verdict.—Answers to Interrogatories.—Presumptions.*—The general verdict necessarily determines all the material issues in favor of the successful party, and, unless the answers to the interrogatories disclose facts so inconsistent with the general verdict that they cannot be reconciled with it under any conceivable state of facts provable under the issues, it must prevail; all presumptions being indulged to sustain the general verdict, but none in favor of the answers to the interrogatories.  
*Kingan & Co. v. Albin, Admr.*, 493, 499 (2).
90. *Verdict.—Answers to Interrogatories.—Scope of Review.*—In passing upon a motion for judgment on the jury's answers to interrogatories, notwithstanding the general verdict, the court on appeal can consider only the general verdict, the answers to the interrogatories and the issues presented by the pleadings.  
*Washburn-Crosby Co. v. Cook*, 463, 467 (3).
91. *Verdict.—Answers to Interrogatories.—Presumptions.*—In reviewing the trial court's ruling on a motion for judgment on

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the interrogatories, all reasonable presumptions should be indulged in favor of the general verdict over the answers to interrogatories.

*Home Brewing Co. v. City of Indianapolis*, 674, 679 (2).

92. *Verdict.—Conflicting Evidence.*—Where the evidence, although sharply conflicting, supports the jury's verdict, it will not be disturbed on appeal. *King Piano Co. v. Brant*, 643, 645 (2).

93. *Verdict.—Interrogatories.—Scope of Review.*—In passing on a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, the court looks only to the general verdict, the issues, and the answers to the interrogatories.

*Indianapolis, etc., Traction Co. v. Hardwick, Admx.*, 102, 198 (2).

94. *Weighing Conflicting Evidence.*—Although the court on appeal will not weigh conflicting evidence, it will not sustain a verdict that is contrary to all the evidence or to some essential element of the case.

*Chicago, etc., R. Co. v. Wesolowski, Admx.*, 5, 8 (1).

95. *Weight of Evidence.*—The court on appeal will not weigh the evidence.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 327 (2).

**(F) HARMLESS ERROR.**

96. *Exclusion of Evidence.*—In an action on a fire policy, error, if any, in excluding a letter, written by insured in negotiations for compromise, containing an admission of blame, was harmless, where the insurer's agent testified to the same admission made by insured to him, and such admission was not denied by insured. *Home Ins. Co. v. Strange*, 49, 58 (6).

97. *Incorrect Instruction.*—In an action for wrongful death, the giving of an instruction incorrectly defining the "burden of proof" was not reversible error, in the absence of any claim that the jury was thereby misled to the disadvantage of appellant. *Kingan & Co. v. Albin, Admx.*, 493, 511 (14).

98. *Instructions.*—The giving of an instruction on the measure of damages which does not limit the jury to a consideration of the evidence applicable to the injuries sustained by plaintiff was harmless, where there was no evidence introduced which could furnish an incorrect basis for the assessment of damages.

*Union Traction Co. v. Smith*, 40, 48 (9).

99. *Instructions.—Prejudicial Error.*—In an action against a railroad company for personal injuries sustained by a passenger in attempting to board a train, where a controlling question in the case was whether defendant had exercised ordinary care, it was reversible error to instruct that defendant owed plaintiff the highest degree of care.

*Pittsburgh, etc., R. Co. v. Friend*, 366, 378 (11).

100. *Instructions Favorable to Appellant.*—Instructions that the plaintiff creditor could not recover from a defendant for holding himself out as a partner of the debtor firm unless such plaintiff sustained, or stands to sustain, financial loss by reason of such holding out, though erroneous for placing a greater burden on the plaintiff than required by law, was harmless as to such defendant. *Irvine v. Baxter Stove Co.*, 105, 110 (4).

101. *Ruling on Motion to Strike Out.*—The court on appeal will sustain the ruling of the trial court in refusing to strike out

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- defendant's so-called set-off, if the pleading is a proper one as a counterclaim, regardless of the fact that the pleader termed it a set-off. *Cleveland, etc., R. Co. v. Partlow*, 616, 619 (1).
102. *Ruling on Demurrer*.—Sustaining a demurrer to a paragraph of answer was harmless, where proof of the facts alleged therein was admissible under the general denial, and the record shows that evidence pertinent to the issue alleged was in fact admitted and that the jury was properly instructed with reference thereto. *Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 326 (1).
103. *Ruling on Demurrer—Judgment*.—In an action to foreclose a chattel mortgage in which appellant was made a party defendant to answer as to his interest in the property involved under a prior mortgage, where there was a general finding for plaintiff and against defendant, and on appeal defendant did not challenge the finding that he had no interest in the mortgaged chattels, but complained only of the ruling of the trial court in sustaining a demurrer to an answer alleging that plaintiff's mortgage was void, the judgment must be affirmed, since appellant, having failed to show or claim any interest in the property in question, could not have been harmed by the judgment and decree, and the court on appeal in such a case will not determine the mere abstract question as to the correctness of the ruling on the demurrer. *Seitz v. Kothe-Wells and Bauer*, 200.
104. *Ruling on Demurrer*.—Where a demurrer is sustained to one paragraph of complaint, and at the time there is another paragraph in the record under which the same facts are provable, and which is substantially upon the same theory, error in sustaining the demurrer is harmless, and the subsequent dismissal of such other paragraph will not render the error, if any, in the ruling on the demurrer available. *Ferguson, Adm., v. Cleveland, etc., R. Co.*, 543, 548 (2).
105. *Sustaining Demurrer*.—In an action to quiet title, error cannot be predicated on the action of the trial court in sustaining a demurrer to a paragraph of answer where a general denial has been filed, since by §1101 Burns 1914, §1055 R. S. 1881, all defenses, legal or equitable, in actions to quiet title, may be made under the general denial, so that the trial court's ruling was harmless. *Sheehan Construction Co. v. Kuhn*, 459, 461 (1).
106. *Striking Out Answer*.—In an employer's action on an employer's liability policy for the amount of a judgment recovered by an injured employe, an answer setting up collusion between the employer and the injured employe and alleging that the judgment against the employer was obtained without trial and without evidence being presented in pursuance of a conspiracy, was not a counterclaim, since it stated no cause of action in favor of defendant, and, being an answer, error, if any, in striking it out was harmless, where all evidence offered by defendant under its allegations was admitted over plaintiff's objection, and its alleged facts were traversed by special findings. *Georgia Casualty Co. v. Schrepferman*, 11, 19 (1).
- (F) WAIVER OF ERROR.
- See also 58-62.
107. *Briefs*.—An appellant waives grounds for new trial to which no specific reference is made in the points and authorities of his brief. *Irvine v. Barter Store Co.*, 105, 112 (9).

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108. *Briefs*.—Error, if any, in the giving of an instruction on the measure of damages is waived by the appellant's failure to present the question of excessive damages in its brief.  
*Union Traction Co. v. Smith*, 40, 48 (8).
109. *Evidence*.—Whether evidence relating solely to the question of damages was erroneously admitted will not be considered on appeal, in the absence of any contention by appellant that the amount of recovery is excessive.  
*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 331 (10).
110. *Instructions*.—Error, if any, in the giving of an instruction relating to the measure of damages is waived by appellant's failure to assert on appeal that the damages awarded are excessive.  
*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 330 (7).
111. *Matters Reviewable*.—*Ruling on Motion for New Trial*.—*Briefs*.—*Failure to Set Out Motion*.—Error, if any, in overruling the motion for new trial is waived, where neither the motion nor its substance is set out in appellant's brief.  
*City of New Albany v. Kiefer*, 289, 293 (3).
112. *Questions Presented*.—*Ruling on Demurrer*.—*Failure to Except*.—Where defendant failed to except to the ruling of the trial court in overruling its demurrer to the complaint, it waived the question, and such ruling will not be reviewed on appeal.  
*Indianapolis, etc., Traction Co. v. Hardwick, Adm.*, 192, 196 (1).
113. *Ruling on Demurrer*.—*Failure to Specify Defects*.—Any error based on defects in a complaint which are not specified in the memorandum accompanying the demurrer is waived.  
*Federal Life Ins. Co. v. Maxam*, 266, 285 (6).

**IX. DETERMINATION AND DISPOSITION OF CAUSE.**

114. *Review*.—*Merit Fairly Tried*.—*Affirmance*.—Where it appears that the case was fairly tried and a correct result reached, and that appellant was deprived of no substantial right, the judgment will be affirmed.  
*Federal Life Ins. Co. v. Maxam*, 266, 288 (12).
115. *Review*.—*Intervening Errors*.—*Correct Result*.—*Affirmance*.—*Statutes*.—Where there is evidence to support every material averment of the complaint, and it fully appears from the record that the cause was fairly tried and a correct result reached, the judgment will be affirmed under §§407, 700 Burns 1914, §§398, 658 R. S. 1881, regardless of error, if any, in the admission and rejection of evidence.  
*Deep Vein Coal Co. v. Ward, Adm.*, 161, 166 (6).

**ARCHITECTS—**

Acceptance of work, conclusiveness, see **CONTRACTS** 3.

**ARGUMENT—**

Of counsel, misconduct, see **TRIAL** 2.

**ASSESSMENTS—**

Street improvements, failure to object, see **MUNICIPAL CORPORATIONS** 10.

**ASSIGNMENT—**

See MORTGAGES 1.

Of contract, consideration, proof, see EXECUTORS AND ADMINISTRATORS.

Of future payment by contractor, release of surety, see SCHOOLS AND SCHOOL DISTRICTS.

Oral, of life policy, validity, see FRAUDULENT CONVEYANCES.

Of policy payable to estate, parol, see INSURANCE 29.

**ASSIGNMENT OF ERRORS—**

See APPEAL 42-44.

**ATTORNEY'S FEES—**

Liability, action to revoke license, see INTOXICATING LIQUORS 3.

**AUTHENTICATION—**

Record, see APPEAL 27, 28.

**BANKRUPTCY—**

1. *Claims.—Allowance.—Effect.*—The action of a referee in bankruptcy in the allowance of a claim is *res adjudicata* as to all who have been made parties to the proceedings in the bankruptcy court. *Spencer Commercial Club v. Bartmess*, 294, 302 (1).

2. *Bankrupt's Estate.—Custody.—Jurisdiction of Court.—Determination of Claims.*—Upon the filing of a petition in bankruptcy followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine all adverse or conflicting claims thereto, whether of title or liens.

*Spencer Commercial Club v. Bartmess*, 294, 302 (2).

**BASTARDS—**

1. *Acknowledgment by Parent.—Statute.—Scope and Effect.*—Section 3000 Burns 1914, Acts 1901 p. 288, providing that illegitimate children may, under certain conditions, inherit the estate of their fathers, is merely a statute of descent, and thereunder the legal status of the child is not changed from illegitimacy to legitimacy by the father's acknowledgment. *Wilson v. Bass*, 116, 125 (3).

2. *Inheritance Through Father.—Statutes.*—Under §§2990-3000 Burns 1914, §§2467, 2468 R. S. 1881, Acts 1901 p. 288, regulating descent in certain cases, an illegitimate child cannot inherit from the mother of its putative father, where the latter dies before the mother. *Wilson v. Bass*, 116, 126 (4).

3. *Inheritance.—Statute Governing.—Construction.*—Section 3000 Burns 1914, Acts 1901 p. 288, providing that illegitimate children may, under certain conditions, inherit the estate of their fathers, is remedial, and should be liberally construed within its terms to effectuate the purpose of its enactment.

*Wilson v. Bass*, 116, 119 (2).

**BENEFICIARIES—**

Of life policy, power to make oral assignment, rights of creditors, see FRAUDULENT CONVEYANCES.

Of life policy, vested interest, see INSURANCE 30.

**BILLS AND NOTES—**

See also EVIDENCE 7; JURY; PRINCIPAL AND SURETY; TENDER.

1. *Accommodation Paper.—Maker's Liability.*—Where one takes accommodation paper without knowledge of its true character, the accommodation party is bound by his apparent standing on the face of the instrument and cannot claim the privilege of a surety of the real debtor.  
*Earle v. Fletcher American Nat. Bank*, 559, 567 (3).
2. *Accommodation Paper.—Holders Without Notice.*—One who has received accommodation paper, even after it has been diverted from its contemplated purpose, without notice of the diversion, in good faith and for value, is entitled to recover thereon.  
*Earle v. Fletcher American Nat. Bank*, 559, 567 (1).
3. *Bank Checks.—Notice to Indorser.—Sufficiency of Evidence.*—In an action against an indorser of bank checks, evidence held sufficient to sustain the finding that notice of the nonpayment of checks was given the indorser within the time required by law.  
*Wells Fargo & Co. v. First Nat. Bank, etc.*, 584, 589 (3).
4. *Bank Checks Payable in Foreign State.—Nonpayment.—Notice to Indorser.—Law Governing.*—In an action against the indorser of bank checks payable in Illinois, the law of that state governs as to the time within which notice of nonpayment must be given to an indorser.  
*Wells Fargo & Co. v. First Nat. Bank, etc.*, 584, 589 (2).
5. *Defenses.—Action Not Prosecuted by Real Party in Interest.—Pleading.*—In an action on a note, the defense that the suit is not prosecuted by the real party in interest, to be available, must be pleaded and proved.  
*Millett v. Aetna Trust, etc., Co.*, 451, 458 (9).
6. *Discharge of Surety.*—In order that a surety, as such, may be discharged by the acts of the creditor or obligee, the latter must have knowledge of the existence of the relation.  
*Earle v. Fletcher American Nat. Bank*, 559, 567 (2).
7. *Extension of Time of Payment.—Effect on Previous Defenses.*—Where the maker of a promissory note agrees with the payee that, if the latter will extend the time of payment for a definite time, he will pay at the expiration of such period, and the time is so extended, such promise constitutes a new contract, binding in law and capable of enforcement, though the maker may have had a good defense to the note before the agreement to extend was made.  
*Millett v. Aetna Trust, etc., Co.*, 451, 457 (5).
8. *Principal and Surety.—Notice of Relation.—Unindorsed Non-commercial Paper.*—The fact that a note given as collateral to secure the payment of a loan is noncommercial paper, and is unindorsed, does not charge the creditor with knowledge that the maker is merely surety.  
*Earle v. Fletcher American Nat. Bank*, 559, 568 (4).

**BONDS—**

Action on trustee's bond, complaint, sufficiency, see TOWNS.

Perfecting appeal, see APPEAL 17.

Construction bonds, recovery by materialmen, see HIGHWAYS.

**BREACH—**

Action, pleading and proof, see CONTRACTS 1.

**BRIEFS—**

See **APPEAL 45-62.**

**BROKERS—**

1. *Real Estate Brokers.—Exchange of Lands.—Commissions.—Necessity of Written Contract.—Statute.*—Under §7463 Burns 1914, Acts 1913 p. 638, a real estate broker cannot recover a commission for his services in bringing about an exchange of land unless he has a contract with his employer in writing.

*Lewis v. Popejoy*, 590.

2. *Real Estate Brokers.—Exchange of Land.—Commissions.—Necessity of Written Contract.—Statute.*—Under §7463 Burns 1914, Acts 1913 p. 638, providing that no contract for the payment of a commission for the finding or procuring of a purchaser for real estate shall be valid unless the contract is in writing, a real estate broker cannot recover a commission upon an oral contract for bringing about an exchange of land, since the term "purchaser," as used in the statute, includes one who acquires title to lands in an exchange of realty

*Elmore v. Brinneman*, 222, 225 (2).

**BUILDING CONTRACTS—**

See **CONTRACTS 3, 4.**

**BURDEN OF PROOF—**

See **EVIDENCE.**

**CARRIERS—**

See also **RAILROADS**; **STREET RAILROADS.**

1. *Carriage of Goods.—Title.—Presumption.*—In the absence of evidence to the contrary, it will be presumed that the title to a shipment of goods is in the consignee.

*Cleveland, etc., R. Co. v. Partlow*, 616, 623 (6).

2. *Carriage of goods.—Consignees.—Reconsignment.—Damages for Delay in Transporting.—Right to Sue.—Statute.*—A consignee of goods may reconsign the same in transit, and where a carrier acceded to the written request of the original consignee to reconsign and forward a shipment of coal to another, the latter must be deemed the consignee and entitled to recover whatever may have accrued, while he was the consignee, for the carrier's failure to transport the coal at the speed required by §5205 Burns 1914, Acts 1907 p. 434.

*Cleveland, etc., R. Co. v. Partlow*, 616, 622, 623 (5).

3. *Carriage of Passengers.—Rules and Regulations.—Duty of Carrier.*—A carrier must provide reasonable means by which passengers may acquaint themselves with its rules.

*Union Traction Co. v. Smith*, 40, 46 (4).

4. *Carriage of Passengers.—Rules of Company.—Right to Establish.—Duty of Passenger.*—In the absence of a statutory provision, a carrier may make reasonable rules and regulations respecting the time, places and circumstances under which certain trains will stop, etc., and it is the duty of a person taking passage on such trains to inform himself as to such rules and regulations, and, if he makes a mistake not induced by the carrier, he has no recourse.

*Union Traction Co. v. Smith*, 40, 46 (3).

5. *Carriage of Passengers.—Change of Cars.—Defective Ticket.—Rights of Passenger.*—Where a passenger, after purchasing a



**CARRIERS—Continued.**

- through ticket, was required to change cars at a way station, and was told by the conductor, who had taken up her ticket, to take passage on a certain car, she was rightfully upon such car and entitled to continue her journey, though the conductor had given her a defective ticket. *Union Traction Co. v. Smith*, 40, 44 (2).
6. *Carriage of Passengers.—Ejectment of Passenger.—Damages.—Mental Distress.*—In a passenger's action against an interurban railroad company for threatening to eject her from a car unless she paid a cash fare, the conductor having declined to accept a defective ticket, it was proper to consider humiliation and mental distress in determining the amount of compensatory damages to which plaintiff was entitled, regardless of physical injury.  
*Union Traction Co. v. Smith*, 40, 47 (6).
7. *Carriage of Passengers.—Ejectment of Passenger.—Liability.*—Where a passenger, after paying fare entitling him to transportation, is required by the carrier to change cars, and through the mistake or negligence of the carrier's agent is given a defective ticket as evidence of his right to continue his journey on the car designated by the carrier, and the conductor, disregarding the passenger's explanation, ejects him, the carrier is liable.  
*Union Traction Co. v. Smith*, 40, 44 (1).
8. *Carriage of Passengers.—Threatened Ejectment of Passenger.—Action.—Jury Questions.—Passenger's Violation of Rules.*—In a passenger's action against an interurban railroad company to recover damages for threatened ejectment from a car, where there was evidence to show that she was riding on a through ticket containing a condition "no stop-overs allowed," that at a way station she was ordered by defendant's conductor to change cars, but was not informed of, or directed to, a particular car in waiting to take passengers discharged from the car on which she had arrived, and that she remained in the waiting room an hour before taking the next car to her destination, the question whether she had voluntarily and without fault of the carrier taken the later car, in violation of the stop-over provisions of the ticket, was for the jury.  
*Union Traction Co. v. Smith*, 40, 46 (5).
9. *Injuries to Passengers.—Proximate Cause.—Negligence.—Pleading.*—In an action against a railroad for personal injuries sustained by plaintiff in attempting to board a train while in motion, averments in the complaint that because of defendant's employees' negligent and careless movement of the train in violation of their duty to hold it until plaintiff could safely board the same, the train was jerked and pulled along faster, and that plaintiff's foot was caused to slip through a broken part of a car step, alleged to have been negligently maintained in a defective condition, show a causal connection between the alleged negligence and plaintiff's injury.  
*Pittsburgh, etc., R. Co. v. Friend*, 366, 374 (6).
10. *Injuries to Passenger.—Action.—Complaint.—Contributory Negligence.*—In a passenger's action against a railroad company for personal injuries, complaint held not to show contributory negligence, although plaintiff's injuries were sustained in attempting to board a train while it was in motion.  
*Pittsburgh, etc., R. Co. v. Friend*, 366, 374 (4).
11. *Injuries to Prospective Passenger.—Contributory Negligence.—Municipal Ordinance.—Assuming Compliance.*—One waiting at a street intersection to board defendant's interurban car as a pas-

**CARRIERS—Continued.**

senger had the right to assume that such car would obey a municipal ordinance requiring it to stop in response to the customary signals, and his further conduct in attempting to cross the track ahead of the approaching car must be considered in the light of such assumption.

*Indianapolis, etc., Traction Co. v. Helms, Adms., 137, 143 (4).*

- 12. Injuries to Prospective Passenger.—Doctrine of Assumed Risk.—Applicability.—Contributory Negligence.**—In an action against a carrier for the death of a prospective passenger, who was struck at a street crossing by one of defendant's interurban cars, the doctrine of assumed risk has no bearing, although the facts which might lead to its invocation in an action between master and servant may affect the issue of contributory negligence.

*Indianapolis, etc., Traction Co. v. Helms, Adms., 137, 142 (1).*

- 13. Injuries to Prospective Passenger.—Action.—Questions for Jury.—Contributory Negligence.**—In an action against an interurban railway for the death of a prospective passenger waiting to board a car at a signal stop, where the complaint alleged that it was the custom, acquiesced in and acknowledged by defendant, for persons intending to board a car after dark to enter upon the track and swing a light as a signal for the car to stop, and that decedent, believing an approaching car was a regular passenger car which would stop on signal, went upon the track to give the customary signal, and was run down and killed by cinder trucks attached to the front end of such car and upon which trucks defendant had carelessly and negligently failed to place any lights, so that on account of the darkness they could not be seen by decedent, it was for the jury to determine whether decedent was guilty of contributory negligence.

*Indianapolis, etc., Traction Co. v. Hardwick, Adms., 192, 198 (5).*

- 14. Passenger Boarding Trains.—Carrier's Breach of Duty.—Complaint.—Sufficiency.**—In a passenger's action against a railroad company for injuries sustained in attempting to board a train, allegations in the complaint that persons standing near called to the trainmen to wait until they should all get on, but that defendant's employees, in violation of their duty to plaintiff to hold the train until plaintiff could safely board it, negligently and carelessly caused the same to pull up, officially showed a failure on the part of the defendant to use ordinary care to protect plaintiff.

*Pittsburgh, etc., R. Co. v. Friend, 366, 373 (3).*

- 15. Passenger Boarding Train.—Duty of Carrier.—Complaint.**—In a passenger's action against a railroad for injuries sustained in attempting to board a train, allegations in the complaint that plaintiff purchased a ticket entitling him to take passage on a certain train, and that he went on the station platform to await its arrival with intent to become a passenger, show at least a qualified relation of passenger and carrier, which imposed on defendant the duty of using ordinary care to protect plaintiff while trying to get aboard.

*Pittsburgh, etc., R. Co. v. Friend, 366, 373 (2).*

- 16. Passenger Boarding Moving Train.—Defective Step.—Contributory Negligence.—Proximate Cause.—Questions of Fact.**—In a passenger's action against a railroad for personal injuries, held that the court on appeal could not say as a matter of law, under the evidence, that plaintiff, who was injured when his foot slipped through a defective car step while attempting to board a moving

**CARRIERS—Continued.**

train with a child in his arms, was guilty of contributory negligence, or that the carrier was not guilty of negligence proximately causing the injury.

*Pittsburgh, etc., R. Co. v. Friend, 366, 377 (9).*

17. *Passengers Boarding Train.—Duty of Carrier.*—Where a family bought their tickets and went on the station platform to await the arrival of the train, those in charge of the movement of the train were chargeable with knowledge of such facts, and owed such passengers the duty of stopping a reasonable length of time for them to get on.

*Pittsburgh, etc., R. Co. v. Friend, 366, 375 (8).*

18. *Passengers Boarding Train.—Duty of Carrier.*—Although the stopping of a passenger train at a station is an invitation to passengers to get on, which ceases when the train starts, it must be stopped a reasonable length of time, and any one attempting to get on after it begins to move does so at his own risk, unless those in charge of the movement of the train have knowledge of the intent or attempt of such party to board it.

*Pittsburgh, etc., R. Co. v. Friend, 366, 375 (7).*

19. *Passengers.—Injuries on Station Grounds.—Care Required of Railroad.*—A carrier owes a passenger who is on the depot platform waiting to take passage on a train only ordinary care not to injure him.

*Pittsburgh, etc., R. Co. v. Friend, 366, 377 (10).*

**CASES—**

Cited, see p. vii.

Reported, see p. iii.

**CHATTEL MORTGAGES—**

1. *Foreclosure.—Conversion by Mortgagee.*—Where, on foreclosure of a chattel mortgage, the mortgagee obtained a judgment awarding him possession of the property, and sold the same after giving the mortgagors ten days' notice as provided in the mortgage, the mortgagors, having no title to the property involved, nor the right to the possession of the same, cannot maintain an action for its conversion against the mortgagee, in the absence of proof by the mortgagors showing payment or other extinguishment of the mortgage, or anything more than the mere right to redeem.

*Sapirie v. Collins, 529, 536 (3).*

2. *Nature.—Title and Possession.*—A chattel mortgage is at law a conditional sale which vests the legal title, and, *prima facie*, the right of possession to the thing mortgaged, in the mortgagee.

*Sapirie v. Collins, 529, 532 (2).*

3. *Recording.—Computation of Time.—Statute.*—While §1350 Burns 1914, §1280 R. S. 1881, providing that the time in which an act is to be done as provided in the Code shall be computed by excluding the first day and including the last, which shall be excluded if it falls on Sunday, applies only to proceedings in civil cases, yet the method of computation of time therein stated has been established by previous decisions of the appellate courts in this state, and such method is applicable in computing the time in which a chattel mortgage must be recorded.

*Wartell v. Peters Hotel Co., 444, 447 (1).*

**CHATTELS—**

Included with land in gross exchange, effect in fixing value of vendor's lien, see **VENDOR AND PURCHASER.**

**CHECKS—**

See **BILLS AND NOTES** 3, 4.

Acceptance, payment, see **ACCORD AND SATISFACTION**.

**CHILD—**

See **ADOPTION**; **DESCENT AND DISTRIBUTION**; **INFANTS**; **PARENT AND CHILD**; **WILLS** 9-11.

Means of support, right to damages for wrongful death of mother, see **INTOXICATING LIQUORS** 2.

**CITIES—**

See **MUNICIPAL CORPORATIONS**.

**CLAIMS—**

Enforcement, pleading and proof, see **EXECUTORS AND ADMINISTRATORS** 2.

**COLLATERAL SECURITY—**

Unindorsed noncommercial paper, notice to creditor of suretyship, see **BILLS AND NOTES**.

Accommodation paper, innocent holder, right to recovery, see **ESTOPPEL** 1.

**COMMISSION—**

Sale of realty, contract, see **BROKERS**.

**COMMON LAW—**

Meaning of words, construction of statutes, see **STATUTES**.

**COMPENSATION—**

Workmen's, see **MASTER AND SERVANT**.

**COMPLAINT—**

See **PLEADING**.

**COMPROMISE AND SETTLEMENT—**

See **ACCORD AND SATISFACTION**.

**CONCLUSIONS OF LAW—**

Allegations, see **PLEADING** 5.

Presenting questions, exceptions, necessity, see **APPEAL** 11.

Pleading, effect, construction of statute, see **PLEADING** 7, 8.

**CONDITIONS—**

See **WILLS**.

**CONDITIONAL SALES—**

See **SALES**.

Evidence, sufficiency, see **APPEAL** 79.

Law of foreign state, presumption, see **APPEAL** 78.

Title of receiver, *bona fide* purchaser, see **RECEIVERS**.

**CONDUCT—**

See **ESTOPPEL** 2.

**CONSIDERATION—**

Want of, proof, parol testimony, see EVIDENCE 7.

**CONSIGNMENT—**

Of goods, delay, action, statute, see CARRIERS 2.

**CONSTRUCTION—**

See CONTRACTS 2; INSURANCE 14, 23; JUDGMENT 4; MASTER AND SERVANT 36; PLEADING 3; STATUTES; WILLS.

**CONTRACTORS—**

Public, rights under statute protecting laborers and materialmen, see TOWNS.

**CONTRACTS—**

See also ACTION; DEEDS; FRAUDS, STATUTE OF; INSURANCE; MASTER AND SERVANT; PRINCIPAL AND SURETY; SALES.

1. *Breach.—Action.—Pleading and Proof.*—In an action for an alleged breach of a contract to pay the purchase price of an automobile in living and tuition in defendant's school, a money demand was not authorized in the absence of pleading and proof of a breach of contract by defendant.

*Indianapolis Conservatory of Music v. McConnell*, 597, 603 (2).

2. *Construction.—Law Controlling.—Intent of Parties.*—A contract is governed by the law with a view to which it is made, and when the intention of the parties in that regard is made to appear it will be given effect, except where they are actuated by fraud. *Chalmers & Williams v. Surprise, Rec.*, 646, 654 (2).

3. *Construction Contracts.—Acceptance of Work by Architect.—Conclusiveness.*—Where a contract provides that work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator, and the parties are bound by his decisions in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment.

*Lake Mich. Water Co. v. U. S. Fidelity, etc., Co.*, 537, 541 (2).

4. *Construction Contracts.—Decision of Arbitrator.—Conclusiveness.*—A provision in a building contract by which an architect or engineer becomes the arbitrator is more binding than an ordinary submission to arbitration, since it becomes a part of the consideration of the contract.

*Lake Mich. Water Co. v. U. S. Fidelity, etc., Co.*, 537, 542 (3).

5. *Executory.—Breach.—Remedies.*—Where one party to an executory contract repudiates it and refuses longer to be bound, the injured party has the right to elect either to treat the contract as rescinded and recover upon the *quantum meruit* as far as he has performed, where the contract is of such a nature that there may be a recovery for part performance, or to keep the contract alive for the benefit of both parties, keeping himself at all times ready, willing and able to perform, and, at the time fixed by the contract for performance, sue and recover according to the terms of the contract on the theory that he has fully performed and discharged all the duties and obligations imposed upon him, except as prevented by the other party, or to treat the breach or repudiation as putting an end to the contract for all purposes of performance, and to sue at once to recover the damages occasioned by such repudiation, in which case the injured party is

**CONTRACTS—Continued.**

not bound to give further notice to the defaulting party of his election before bringing suit, nor to show, as a condition precedent to recovery, that he has been at all times ready, willing and able to perform after the time when the other party repudiated the contract. *Federal Life Ins. Co. v. Mazam*, 266, 278 (4).

6. *Ratification.—Void as Against Public Policy.*—A contract void as against public policy is not susceptible of ratification.

*Millett v. Aetna Trust, etc., Co.*, 451, 458 (6).

7. *Voidable Contract.—Ratification.—Execution of Renewal Notes.*—Where a contract on which a note is based is only voidable, it may be ratified by an execution of a renewal note by the maker with full knowledge of the facts.

*Millett v. Aetna Trust, etc., Co.*, 451, 458 (8).

8. *Void as Against Public Policy.—Waiver of Defense.—Estoppel.—Waiver of Illegality.*—A contract, void as against public policy, as between the parties, cannot be rendered valid by invoking the doctrine of estoppel, nor can a party thereto waive his right to set up the defense of illegality in an action thereon by the other party.

*Millett v. Aetna Trust, etc., Co.*, 451, 458 (7).

**CONTRIBUTORY NEGLIGENCE—**

See CARRIERS 10-13; NEGLIGENCE; RAILROADS.

**CORPORATIONS—**

*Indebtedness of Insolvent Corporation.—Failure to Collect Stock Subscriptions.—Liability of Directors.—Statutes.*—In an action against the directors of an insolvent corporation under §5104 Burns 1914, §3868 R. S. 1881, making the directors of a corporation organized under the mining and manufacturing act liable for all debts of the corporation contracted after insolvency resulting from its violation of the act, provided the directors directed or assented to such violation, wherein the right of recovery was based on the alleged failure of the directors to comply with §5089 Burns 1914, §3859 R. S. 1881, requiring the capital stock, as fixed by the company, to be paid into the treasury within eighteen months, findings including facts showing that defendant directors assented to the company's failure to collect stock subscriptions and as a result thereof the corporation became insolvent, and that thereafter it became indebted to plaintiff, *held* sufficient to sustain the conclusion of law that defendants were liable.

*Battes v. Armour Leather Co.*, 233, 235 (2).

**COSTS—**

*Right to Recover.*—Costs are never allowed a party in the absence of a statute, and a party claiming costs must show that the costs or charges which he claims are within the statute.

*State, ex rel. v. Freiberg*, 1, 4 (8).

**COUNTERCLAIM—**

See SET-OFF AND COUNTERCLAIM.

**COURTS—**

Power of, custody of children, see INFANTS 2.

Rules of, compliance, see APPEAL 40, 50.

Terms, judicial notice, see EVIDENCE 2.

**COURTS—Continued.**

1. *Entry*.—An entry, as applied to judicial proceedings, is a statement of a conclusion reached by the court, or an act done during the progress of a cause, which is spread of record, and designed to furnish incontestable evidence of the matter stated.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 341 (8).

2. *Jurisdiction*.—*Transfer of Cause from Supreme to Appellate Court*.—*Effect*.—*Validity of Ordinance*.—Where plaintiff sued a town and its board of trustees to enjoin them from enforcing an ordinance making it unlawful to maintain and operate a junkyard within limits including plaintiff's yard, on the ground that the ordinance was invalid and void, and that the board had no authority to pass it, and, on judgment being rendered for defendants, plaintiff appealed to the Supreme Court where he attempted to raise the question of the validity of the ordinance that court's transfer of the cause to the Appellate Court for want of jurisdiction was equivalent to a finding that the power of the board to enact the ordinance must be regarded as settled, and such question could not be considered on appeal.

*Peale v. Town of Arcadia*, 258.

3. *Opinions*.—*Construction*.—Statements made by a court in an opinion should be considered in the light of the record then under consideration.

*Brehm v. Hennings*, 625, 630 (3).

**CREDITORS—**

Definition, see **SALES 2**.

Defrauding, by oral assignment of policy, see **FRAUDULENT CONVEYANCES**.

**CROSSINGS—**

See **RAILROADS**; **STREET RAILROADS**.

**CUSTODY—**

Of child, statute, see **INFANTS**; **PARENT AND CHILD**.

**DAMAGES—**

See **ACTION**; **CARRIERS**; **DEATH**; **ELECTRICITY**; **FRAUD**; **INTOXICATING LIQUORS**; **MUNICIPAL CORPORATIONS**; **NEGLIGENCE**; **NUISANCE 2**; **RAILROADS**; **VENUE**; **WATERS AND WATERCOURSES**.

**DANGEROUS MACHINERY—**

Injuries to employe, action, liability, see **MASTER AND SERVANT 10, 16, 22-24**.

**DATES—**

Mortgages, taking effect, see **DEEDS**.

Presumption as to execution, see **EVIDENCE 3**.

**DEATH—**

Wrongful, action, see **APPEAL 80**.

1. *Action for Wrongful Death*.—*Who May Sue*.—*Statute*.—Under §285 Burns 1914, Acts 1899 p. 406, relating to the recovery of damages for wrongful death, the administrator is the only person who can maintain such an action.

*Drury, Gdn., v. Krogman*, 607, 612 (3).

2. *Wrongful Death*.—*Right of Action for Damages*.—The right to maintain an action for damages for wrongfully causing the death of a human being is purely statutory.

*Drury, Gdn., v. Krogman*, 607, 612 (2).

**DEEDS—**

See also EVIDENCE 3.

*Mortgages.—Date of Taking Effect.*—Deeds and mortgages become effective from the time of their execution, which includes their delivery to, and acceptance by, the grantee or mortgagee.

*Cassidy v. Ward*, 550, 555 (4).

**DEFAULT—**

Setting aside, application, sufficiency, see JUDGMENT.

**DEMURRER—**

See PLEADING.

Ruling on, review, see APPEAL 14, 39, 45, 68, 69, 78, 102-105, 112, 113.

Waiver of defect by failure to demur, see PLEADING 6, 9, 12.

**DEPENDENT CHILD—**

Statute, construction, see INFANTS 3, 4.

**"DECENDANTS"—**

Meaning, see DESCENT AND DISTRIBUTION.

**DESCENT AND DISTRIBUTION—**

1. *"Child."*—*"Children."*—*"Descendants."*—*Statutes.*—The words "child," "children," and "descendants" and the like, as used in §§2990, 2991 Burns 1914, §§2467, 2468 R. S. 1881, regulating descent in certain cases, *prima facie* mean legitimates.

*Wilson v. Bass*, 116, 119 (1).

2. *Heirs.*—In its strict legal or technical sense, the word heirs refers to those on whom the law casts the inheritance in the absence of a will. *Nickerson v. Hoover. Admr.*, 343, 350 (1).

**DEVICES—**

See WILLS.

**DIRECTORS—**

Of insolvent corporation, failure to collect stock subscriptions, liability, see CORPORATIONS.

**DISMISSAL—**

As final judgment, see APPEAL 1, 2.

**DRAINS—**

Obstructing, statute, see WATERS AND WATERCOURSES.

**ELECTION OF REMEDIES—**

*Breach of Contract.—Action.—Notice.*—The bringing of an action, or taking legal steps to enforce a contract, amounts to an election by the party not to rescind on account of anything known to him, and where a party institutes a suit for damages for the breach of an executory contract, his action is notice to the other party of his election to treat the contract as breached and at an end, except for the purpose of ascertaining the resulting damages, and such election is conclusive against the party making it.

*Federal Life Ins. Co. v. Mazam*, 266, 284 (5).



**ELECTRICITY—**

*Transmission of Electric Current.—Liability for Injuries.*—Where the furnisher of electricity supplies the same to a customer first through its own wires, and then through wires owned and maintained by the customer, and over which the furnisher has no supervision or control, he is not liable for injury resulting from the negligent manner in which the customer's wires are equipped and maintained. *Caldwell v. Alley*, 313 321 (3).

**EMPLOYER'S LIABILITY—**

See MASTER AND SERVANT 17-21.

Insurance, policy, construction, see INSURANCE 6-8.

**EMPLOYEES—**

See MASTER AND SERVANT.

**ENTRY—**

Definition, see COURTS 1.

**EQUITY—**

Relief in, forfeiture of lease, see MINES AND MINERALS.

*Right to Relief.—Injury to Property.—Inadequacy of Legal Remedy.*—The office of equity is not to supplant, but to supplement, the law, and whenever a party has a clear legal right, in matters of property, and no adequate remedy at law, he is entitled to the aid of a court of equity. *Haupt v. Schmidt*, 260, 262 (1).

**ESTATES—**

Vesting, see WILLS.

**ESTOPPEL—**

See also CONTRACTS 8; INSURANCE 15, 19; MASTER AND SERVANT 50; MUNICIPAL CORPORATIONS 4, 10; PARTNERSHIP.

1. *Accommodation Paper.—Innocent Holders.—Right of Recovery.*—Where a mother invested her son with apparent ownership of a noncommercial note and mortgage, which in fact was accommodation paper, and the son, by depositing such paper as collateral security, obtained not only the loan contemplated by the maker of the accommodation paper, but also several renewals thereof, the lender, being without notice, could recover on the collateral on the son's failure to make repayment, since, where one of two innocent persons must suffer by the act of a third, he who put it in the power of the third to do the act must suffer.

*Earle v. Fletcher American Nat. Bank*, 559, 568 (5).

2. *By Conduct.—Failure to Assert Title to Land.*—Where a commercial club had its president convey land knowing that he had previously conveyed it to a trustee, and for more than two years after grantee's bankruptcy failed to assert any claim to the property, though the bankruptcy court had adjudged valid a mortgage given by the grantee, the club was estopped from thereafter claiming the property as against the mortgagee.

*Spencer Commercial Club v. Bartmess*, 294, 303, 304 (3).

3. *By Deed.*—The owner of real estate attesting a deed made by a person having no title, if such owner knows the contents of the deed, will by attesting it be estopped from setting up his own title against the grantee and his privies.

*Spencer Commercial Club v. Bartmess*, 294, 304 (6).

**ESTOPPEL—Continued.**

4. *By Deed.—Interest Conveyed.*—Where the president of defendant commercial club, in his capacity as trustee of an insolvent company, transferred the company's real estate to another under an agreement that if plaintiff fulfilled a certain contract the land should be deeded to him, and if he failed it should be conveyed to the club, and subsequently, after certain changes were made in the contract, the directors of the club ordered a deed prepared conveying the property to plaintiff and had it executed by its president as such trustee, although unknown to plaintiff, he had filed his final report and been discharged, such deed was sufficient to pass to grantee whatever equitable interest the club had in the land, notwithstanding the conveyance was ineffectual to carry the legal title.

*Spencer Commercial Club v. Bartmess*, 294, 303 (5).

5. *By Words or Conduct.*—When a person by his words or conduct causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own position, the former is precluded from averring a different state of things as existing.

*Spencer Commercial Club v. Bartmess*, 294, 303 (4).

**EVIDENCE.**

- I. JUDICIAL NOTICE, 1, 2.  
II. PRESUMPTIONS, 3.  
III. BURDEN OF PROOF.  
IV. ADMISSIONS, 4, 5.

- V. INFERENCES, 6.  
VI. PAROL AND EXTRINSIC EVIDENCE, 7-9.  
VII. DOCUMENTARY EVIDENCE, 10.

For evidence in particular actions or proceedings, see also the specific topics.

**I. JUDICIAL NOTICE.**

1. *Authentication of Transcript.—Designation of Clerk.*—A transcript of a record on an appeal from the circuit court, signed by the clerk of the superior court, is sufficient, since the appellate court judicially knows that the clerk of the circuit court is *ex officio* clerk of the superior court.

*State, ex rel. v. Freiberg*, 1, 3 (1).

2. *Expiration of Term of Court.*—The Appellate Court knows judicially that the October, 1916, term of the Lake Superior Court expired in November of that year.

*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 487 (3).

**II. PRESUMPTIONS.**

See also SALES; CARRIERS 1.

3. *Prima Facie.—Date.*—The date of a deed or mortgage only furnishes *prima facie* evidence of the date of its execution, which may be rebutted.

*Cassidy v. Ward*, 550, 555 (3).

**III. BURDEN OF PROOF.**

Action for wrongful death, or personal injuries, contributory negligence, see MASTER AND SERVANT 15; RAILROADS 7.

As to company's waiver of conditions, see INSURANCE 12.

On issue of employee's wilful misconduct under Workmen's Compensation Act, see MASTER AND SERVANT 41.

Equitable relief, right to, see MINES AND MINERALS 1.

Foreclosure, interest on claims, see MECHANICS' LIENS.

**EVIDENCE—Continued.****IV. ADMISSIONS.**

4. *Declaration Against Interest.—Admissibility.*—In an action for personal injuries, plaintiff's statement, "it was all my fault," made shortly after the accident resulting in the injuries complained of, was competent as an admission against interest.

*Warner Gear Co. v. DePeugh*, 264, 265 (1).

5. *Weight and Effect.—Questions for Jury.*—Admissions when proved to have been made are to be considered and weighed the same as other evidence, and the effect of the circumstances under which the admissions were made is to be determined by the jury.

*Warner Gear Co. v. DePeugh*, 264, 265 (2).

**V. INFERENCES.**

6. *Force and Effect.*—An inference, when authorized and drawn, has the same force and effect as a proved fact, and, in connection with the other facts established, may authorize a further or additional inference or inferences.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 327 (4).

**VI. PAROL AND EXTRINSIC EVIDENCE.**

See also **SALES**.

7. *Action on Note.—Lack of Consideration.*—In an action by a bank against an administrator to enforce a claim against a decedent's estate based on a promissory note executed by deceased, who had been an official of the bank, in payment of claimant's stock, parol evidence tending to show that deceased never owned such stock as an individual and that the note was executed solely for the benefit of the bank was admissible as showing want of consideration for the note.

*Columbia Nat. Bank v. Miller, Admr.*, 187, 191 (2).

8. *Admissibility.—Contents of Letter.—Oral Testimony After Notice to Produce.*—It was not error for the trial court to permit plaintiff to testify as to the contents of a letter alleged to have been written by him to defendant, where the record shows that timely notice had been served on defendant to produce the same.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 483 (8).

9. *Vendor's Lien.—Exchange of Land and Chattels in Gross.—Value of Each.*—When called upon to enforce an alleged vendor's lien arising out of a sale or exchange of land and chattels in gross, a court of equity may hear extrinsic evidence as to the value placed on each by the parties to the transaction.

*Boyd v. Greer*, 77, 81 (2).

**VII. DOCUMENTARY EVIDENCE.**

10. *Documents.—Denial of Execution.—Statute.*—In an action for possession of real estate and to recover damages for its detention, where defendant relied upon a written instrument purporting to give him the right of occupancy free of rent, but no pleading was founded on such instrument, §370 Burns 1914, §364 R. S. 1881, providing that when a pleading is founded on a written instrument, such instrument may be read in evidence without proving its execution, does not apply. *Price v. Mitchell*, 671, 673 (2).

**EXCEPTIONS—**

Necessity, grounds of appeal, see **APPEAL** 3-15.

**EXCEPTIONS, BILL OF—**

See also **APPEAL** 19-26, 29, 36.

1. *Filing.—How Shown.—Clerk's Certificate.—Sufficiency.*—The certificate of the clerk merely reciting that the transcript contains the longhand report of the evidence as filed in his office by the court reporter is not sufficient to show that the bill of exceptions containing the evidence was filed.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 340 (3).

2. *Incorporating in Record.—Praecept.*—A written praecipe addressed to the clerk directing him to make out a complete transcript of all the pleadings, entries and orders made and entered of record in the cause, did not include a direction to include a bill of exceptions containing the evidence.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 340, 341 (5).

3. *Requisites.—Certificate of Judge.*—The longhand report of the evidence alone does not constitute a bill of exceptions, the certificate of the trial judge being required to make it a completed bill.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 339 (2).

4. *Requisites.—Identification.—Statement.*—While it is not necessary that a bill of exceptions containing the evidence shall have any particular form of introduction, yet it should be preceded by a statement sufficient to identify it as a bill of exceptions.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 342 (10).

**EXCESSIVE DAMAGES—**

Statute, applicability, see **NEW TRIAL** 2.

**EXECUTION—**

Proof of, when necessary, statute, see **EVIDENCE** 10.

**EXECUTION CREDITOR—**

See **SALES** 2.

**EXECUTORS AND ADMINISTRATORS—**

See also **WILLS**.

Administrator, right to sue for wrongful death, see **DEATH**.

1. *Assignment of Contracts.—Consideration.*—Where plaintiff's sister left defendant's conservatory before completing her paid-up course of study under a written contract between her father and defendant, and defendant and plaintiff verbally agreed that the latter might receive the remaining instructions under the contract, plaintiff, upon her appointment as administratrix of her father's estate and assignment of the contract by her as administratrix to herself as an individual, could not recover for a breach of the verbal contract in the absence of evidence showing consideration in that she had succeeded to the rights of her father in the original contract.

*Indianapolis Conservatory of Music v. McConnell*, 597, 603 (1).

2. *Claims against Estate.—Enforcement.—Pleading and Proof.*—In a proceeding to enforce a claim against a decedent's estate, proof of all defenses except set-off and counterclaim are admissible under the general denial, in view of §2842 Burns 1914, Acts 1883 p. 156. *Columbia Nat. Bank v. Miller, Admr.*, 187, 189 (1).

**EXECUTORY CONTRACTS—**

See **CONTRACTS** 5.

**FEE SIMPLE—**

Devise, devise over, vesting of estate, see **WILLS** 6.

**FINDINGS—**

Review, see **APPEAL** 82.

**FIRE INSURANCE—**

See **INSURANCE** 9-12.

**FLOODS—**

Effect of, as defense in action for obstructing stream, instructions, see **RAILROADS** 11-16.

**FORECLOSURE—**

See **CHATTEL MORTGAGES**; **MORTGAGES**.

**FOREIGN LAWS—**

Contracts, execution, presumption, see **SALES**.

Presumption, see **APPEAL** 78.

**FORFEITURE—**

Of lease, equitable relief, see **MINES AND MINERALS** 2-4.

Of policy, see **INSURANCE** 15-20.

**FRAUD—**

See also **FRAUDULENT CONVEYANCES**; **INSURANCE** 6.

1. *Action.—Exchange of Lands.—Fraudulent Representations.—Measure of Damages.*—In an action for damages for alleged false and fraudulent representations as to the character and value of land conveyed to plaintiffs by defendants in exchange for other land, the measure of damages is the difference between the actual value of the property deeded to plaintiffs at the time of the exchange, and what it would have been worth had it been as represented, and in such action the value of the land conveyed by plaintiffs is immaterial. *Valdenaire v. Henry*, 68, 71 (3).

2. *Action.—Exchange of Lands.—Defenses.*—In an action for damages for false representations as to the character of land exchanged by defendants for land belonging to plaintiffs, where plaintiffs proceeded to a city within two hours' ride of defendants' land and could easily have inspected the property, but, because of the insistence of the husband of one of the defendants that the transaction be closed immediately to enable him to keep an urgent engagement in another city, plaintiffs were induced to telegraph to release the deed to their land, which they had deposited in escrow before leaving home, without inspecting defendants' property, they had a right to rely on defendants' representations. *Valdenaire v. Henry*, 68, 73 (6).

3. *Action.—False Representations.—Damages.—Right to Recover.*—Where plaintiffs, after executing a contract of sale and placing in escrow deeds to their land, journeyed to a distant state to take charge of the property, which was to be conveyed to them by defendants, a subsequent performance by plaintiffs, even with full knowledge of the fraud which had been practiced on them, would not bar them to a right to recover damages for fraudulent representations as to the land plaintiffs were to receive.

*Valdenaire v. Henry*, 68, 74 (7).

**FRAUD—Continued.**

4. *Reliance on Fraudulent Representations.*—Where defendants induced plaintiffs, who had never been in California, to exchange their lands for lands located in that state, and plaintiffs' inquiries of a nephew in California did not elicit information disclosing the falsity of defendants' representations, defendants are not in position to complain that plaintiffs were negligent in relying upon their representations without further inquiry.

*Valdenaire v. Henry*, 68, 73 (5).

5. *Representations of Value.—Effect.*—In an action to recover damages for fraud, where plaintiffs were induced by defendants' representations to exchange their real estate for lands located in southern California, upon which defendants lived and had special knowledge of its character and value, and concerning which facts defendants knew plaintiffs, who were residents of Indiana and had never been in California, to be wholly ignorant, plaintiffs were justified in relying on defendants' representations without making inquiry as to their truthfulness.

*Valdenaire v. Henry*, 68, 72 (4).

**FRAUDS, STATUTE OF—**

1. *Contract for Sale of Land.—Sufficiency of Memoranda.*—Under the statute of frauds, which requires that all contracts for the sale of real estate shall be in writing, separate writings cannot be construed together as constituting a contract, where there is no reference in any one of the instruments to either of the others, and extrinsic evidence, which is not permissible, would be necessary to show their relation.

*Feichter v. Korn*, 205, 210 (1).

2. *Default of Third Person.—Subcontractor's Guaranty.*—In a subcontractor's action to foreclose a mechanic's lien, where defendant answered that the plaintiff was a party to, and a partner in, the principal contract, and was to share in the profits, and that he had guaranteed that a certain appliance to be installed in defendant's factory by the principal contractor would do the work for which it was sold, the answer was good, even though the guaranty was not in writing, since, under the facts alleged, it was not a promise to answer for the debt, default or miscarriage of another.

*Ooonse, etc., Ice Co. v. Home Stove Co.*, 226, 232 (3).

**FRAUDULENT CONVEYANCES—**

- Life Policy.—Oral Assignment.—Validity.—Defrauding Assignor's Creditors.*—Where insured and his father, the beneficiary in a life policy, talked about changing the policy so as to make the son's wife the beneficiary, but, on the advice of the cashier of a bank holding the policy as collateral security for the payment of a note that it would be better not to make any changes until after the note was paid, nothing was done relative to changing the beneficiary, on the death of the son the proceeds of the policy were the absolute property of the father, although he had informed insured that in case of the latter's death he would assign the insurance to the wife, and the father could not, after insured's death, make a gift of such proceeds to the wife to the detriment of the father's creditors.

*Brown v. Farmer's State Bank*, 182, 187 (3).

**GUARANTY—**

Definition, see **PRINCIPAL AND SURETY**.

Of subcontractor, default of third person, liability, see **FRAUDS, STATUTE OF**.

**HARMLESS ERROR—**

See **APPEAL 96-106**.

**HEIRS—**

Construction of term, see **WILLS**.

**HIGHWAYS—**

*Construction.—Contractor's Bond.—Recovery on by Materialman.—Statutes.*—A materialman may recover on a public contractor's bond without first having complied with §§5901a-5901b Burns 1914, Acts 1911 p. 437, requiring materialmen to file claims with agents of the county within thirty days after the materials are furnished, since such act expressly declares that it shall not be construed as conflicting with any other laws for the protection of materialmen, but as supplemental thereto.

*Equitable Surety Co., etc. v. Ind. Fuel Supply Co.*, 75.

**HUSBAND AND WIFE—**

Devise to wife during widowhood, validity, see **WILLS 21**.

*Action for Service by Wife.—Joining Husband as Party.*—Section 255 Burns 1914, §254 R. S. 1881, providing that a married woman may sue alone when the action covers her personal property, is permissive, and does not prohibit the husband joining with her in the prosecution of an action to recover compensation for her services rendered on her sole and separate account.

*Delaski v. Kovacich*, 203, 204 (2).

**ILLEGITIMATE CHILDREN—**

See **BASTARDS**.

**INDEPENDENT CONTRACTOR—**

See **MASTER AND SERVANT 6, 7, 45, 46; NEGLIGENCE 5**.

**INDORSEMENT—**

Bank checks, notice, see **BILLS AND NOTES 3, 4**.

**INDUSTRIAL BOARD—**

Proceedings before, under Workmen's Compensation Act, see **MASTER AND SERVANT 28-50**.

**INFANTS—**

1. *Custody.—Statute.*—Section 1646 Burns 1914, Acts 1907 p. 59, relating to dependent or neglected children, cannot be used for the purpose of determining a controversy between the mother and a grandparent as to who should have the custody of a child.  
*Orr v. State*, 242, 254 (6).

2. *Custody of Children.—Policy of State.—Province of Courts.*—It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens and making them wards of the state, but it is a legislative function, which cannot be delegated to the courts.  
*Orr v. State*, 242, 251 (3).

**INFANTS—Continued.**

3. *Dependent Child.—Statute.*—Although uncared for by both parents, a female child under the age of seventeen years is not a dependent child within the meaning of §1642 Burns 1914, Acts 1907 p. 59, providing that any girl under the age of seventeen years, who is dependent upon the public for support, or who is destitute, homeless or abandoned, shall be deemed to be a dependent child, where she has never been a charge upon the public, nor been destitute, homeless or abandoned, but has been sheltered and cared for by a grandparent, who desires to continue such care and protection.  
*Orr v. State*, 242, 249 (1).
4. *Dependent and Neglected Children.—Abandonment.—Evidence.—Sufficiency.*—In a proceeding under §1642 *et seq.* Burns 1914, Acts 1907 p. 59, to have an infant declared a dependent or neglected child, a mother who left home because of the cruel treatment of an insane husband *held* not to have abandoned or deserted her child, she having left it in the care and custody of the husband's parents.  
*Orr v. State*, 242, 256 (8).
5. *Neglected or Dependent Children.—Statute.—Proceedings.—Parties.*—Proceedings under §1642 *et seq.* Burns 1914, Acts 1907 p. 59, relating to dependent or neglected children, should not be prosecuted in the name of the state.  
*Orr v. State*, 242, 251 (4).
6. *Neglected Child.—Statute.*—A child abandoned by its parents and who was taken by the grandparents into their home and treated as a member of their own family, is not a neglected child within the meaning of §1642 Burns 1914, Acts 1907 p. 59, defining a neglected child as one not having proper parental care or guardianship.  
*Orr v. State*, 242, 250 (2).

**INFERENCES—**

Consideration, in aid of allegations, see PLEADING 10.

Effect, see EVIDENCE 6.

**INHERITANCE—**

Rights of illegitimates, statute, see BASTARDS.

**INJUNCTION—**

1. *Complaint.—Sufficiency.*—In an action to recover bonds deposited as collateral to secure the payment of a promissory note, allegations in the complaint, *held* sufficient upon demurrer to show that plaintiff's agent had authority, upon being informed by payee bank as to the amount due on the note, to make a tender and demand the return of the bonds, and that the amount tendered was the full amount due.

*Webb v. Citizens Nat. Bank, etc.*, 22, 29 (2).

2. *Office of.—Protection of Property.*—Broadly stated, the office of an injunction is to protect property, and rights of property.

*Haupt v. Schmidt*, 280, 262 (2).

**INSTRUCTIONS—**

See TRIAL 10-20.

Review, see APPEAL 6, 9, 13, 28-30, 33, 34, 63, 66, 74, 75, 97-100.

**INSURANCE—**

See also APPEAL 103.

1. *Agents.—Delegation of Authority.*—Generally, agents of insurance companies who are authorized to contract for risks, receive



**INSURANCE—Continued.**

and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to execute the same powers, the service not being of a personal character.

*Home Ins. Co. v. Strange*, 49, 54 (1).

2. *Agents.—Notice to.*—Notice to the agent of an insurance company is binding, though not communicated to it.

*Home Ins. Co. v. Strange*, 49, 57 (3).

3. *Accident Insurance.—Construction of Policy.—Beneficiary Indemnity.—Cause of Injury.*—An accident insurance policy insuring against injury to the beneficiary while a passenger in a railroad passenger car, steam vessel, passenger elevator, or in consequence of the burning of a building, does not cover death resulting from injury while in an automobile.

*Rubens v. U. S. Casualty Co.*, 35, 39 (2).

4. *Casualty Insurance Companies.—Investments.—Proceeds from Sale of Stock.—Statute.*—Under §4769 Burns 1914, Acts 1909 p. 281, prescribing how casualty companies shall invest the money received from the sale of their capital stock, such a company is not prohibited from depositing any of its funds in banks, and taking therefor certificates of deposit, payable either on demand or on a day specified, until such time as investments in accordance with the statute may be made, or from assigning notes given for the purchase price of stock, and receiving certificates of deposit therefor. *Central Bank, etc. v. Martin*, 387, 391 (1).

5. *Casualty Insurance Companies.—Investments.—Proceeds from Sale of Stock.—Rights of Stockholder.—Statute.*—While the investment by a casualty company of money received from the sale of its capital stock in securities other than those named in §4769 Burns 1914, Acts 1909 p. 281, would be wrongful, yet the transaction would not be void, but merely voidable, and, though a stockholder injured thereby might find a way in a court of equity to protect his rights, he cannot defend an action on his note given to such company for stock and assigned to plaintiff bank in return for its certificate of deposit on the ground that the transaction constituted an unlawful investment of the proceeds from the sale of the capital stock of the company.

*Central Bank, etc. v. Martin*, 387, 392 (2).

6. *Employers' Liability Insurance.—Insured's Action on Policy.—Defenses.—Fraud or Collusion.*—In an action on an employer's liability policy for the amount of a judgment recovered by an injured employe, where the insurer, with full knowledge of the accident, injury and pendency of the suit therefor and of the proceedings in court when the judgment was rendered against the employer, failed and refused to participate in the defense, as provided by the terms of the policy, it cannot challenge the judgment obtained by the employe for fraud, collusion, or for any other reason.

*Georgia Casualty Co. v. Schrepferman*, 11, 22 (3).

7. *Employers' Liability Insurance.—Policy.—Construction.—Immediate Notice of Injury.*—Where an employe was injured on October 17, 1913, and the employer gave notice of the accident to the company carrying his employer's liability insurance on October 20, and again on November 28, and, having received no acknowledgment thereof, sent another notice on December 29 on a blank furnished by the insurer, the notice to the insurer was sent within such time as to constitute compliance with a pro-

**INSURANCE—Continued.**

vision of the policy requiring immediate written notice of the occurrence of an accident.

*Georgia Casualty Co. v. Schrepferman*, 11, 20 (2).

8. *Employers' Liability Insurance.—Subrogation.—Action.—Complaint.—Sufficiency.*—Where an employer's liability company, after paying a judgment obtained against insured employer by an employe injured by the explosion of an alleged defective boiler tube, and the company which sold the tube to the employer on the theory of subrogation of the employer's right of action for breach of implied warranty, the complaint held insufficient for want of facts in that it failed to aver that the explosion of the tube resulted from its alleged defective construction.

*Maryland Casualty Co. v. Knight & Jillson Co.*, 637.

9. *Fire Insurance.—Notice of Vacancy.—Sufficiency.*—Under a fire insurance policy stipulating that the policy would be void if any of the buildings insured remained vacant for more than ten days without the insurer's consent, a notice of vacancy was sufficient when given to the bookkeeper and policy clerk employed by agents for the insurance company, upon her assurance that she would take a note of the notice and bring it to the attention of one of the agents on his return to the office.

*Home Ins. Co. v. Strange*, 49, 55 (2).

10. *Fire Insurance.—Conditions.—Vacancy.*—The condition in a fire policy that vacancy of the building insured without the written consent of insurer shall avoid the policy, being a stipulation in favor of the company, may be waived by express agreement or conduct, and such waiver can be by the promise, failure and conduct of the company's authorized agent.

*Home Ins. Co. v. Strange*, 49, 57 (4).

11. *Fire Insurance.—Breach of Conditions.—Failure to Assert Forfeiture.*—Where a fire insurance company had notice of the purpose of insured to change the use of a dwelling to that of storage house, and it failed to assert its right of forfeiture, it waived such right.

*Home Ins. Co. v. Strange*, 49, 57 (5).

12. *Fire Insurance.—Waiver of Conditions.—Burden of Proof.*—In an action on a fire policy providing that the insurer would not be liable for fire damage to any dwelling house while unoccupied, unless the policy was continued in force during such vacancy by the written consent of a director of the company, the burden of showing insurer's alleged waiver of the vacancy provision by a retention of unearned premium was on the insurer, and the absence of a finding as to the existence of any unearned premium must be construed to mean that all sums paid to the insurer were fully earned.

*Menser v. Marshall, etc., Ins. Co.*, 211.

13. *Life Insurance Application.—Construction.—Intention.—Warranties.*—Answers to questions in an application for insurance will not be construed as warranties unless they are clearly shown by the form of the contract to have been so intended by the parties, but where it appears that they so intended they must be literally true or the insurance is voidable.

*Western Indemnity Co. v. Couch*, 684, 705 (9).

14. *Life Insurance.—Construction of Policy.—Reinsurance.*—Where a reinsurance contract gave the policyholders the option of paying the reinsurance company the same premiums, and receiving insurance in such amount as the premiums would purchase ac-

**INSURANCE—Continued.**

ording to an annexed table of rates, or of making application, and by furnishing satisfactory evidence of insurability, receive a new policy upon surrendering the old one for cancellation, an incontestability clause contained in the old policy did not become a part of a new policy issued to one choosing the second alternative, in the absence of any provisions to that effect.

*Western Life Indemnity Co. v. Couch*, 684, 697 (3).

15. *Life Insurance.—Forfeiture of Policy.—Estoppel.*—Where an insurer, after receiving information from an investigating bureau that insured had made false warranty as to the condition of his health, wrote a letter to the beneficiary containing no intimation of an intention to rescind, and requesting further proof, which she obtained at some expense, the insurer was not estopped from relying on the breach of warranty to forfeit the policy, where the beneficiary knew of the investigation being made by the insurer and that the policy would probably be contested.

*Western Indemnity Co. v. Couch*, 684, 710 (12).

16. *Life Insurance.—Forfeiture of Policy.—Tender of Premiums.—Reasonable Time.*—When insured died on April 30, and on August 10 following insured learned of a breach of warranty, when it notified the beneficiary of its intention to rescind, and mailed her a check for premiums paid, which she returned without objection to the form of the tender, and, suit having been filed August 19, insurer on November 30 offered to pay the beneficiary in legal tender the amount of premiums paid, together with interest thereon and accrued court costs, the latter tender was made within a reasonable time.

*Western Life Indemnity Co. v. Couch*, 684, 700 (5).

17. *Life Insurance.—Forfeiture of Policy.—Return of Premiums.—Reinsurance.*—Where a life insurance company became insolvent and one holding a policy therein exercised his option under a contract of reinsurance of surrendering his old policy, taking out a new one in the purchasing company, the latter company, in forfeiting the policy for a breach of warranty, was only required to repay the premium paid to it.

*Western Life Indemnity Co. v. Couch*, 684, 700 (6).

18. *Life Insurance.—Forfeiture of Policy.—Breach of Warranty.—Medical Examination.—False Answers.*—Where an application for a new policy in a reinsuring company referred to a medical examination for the original insurance and warranted the statements in it to be true, thereby making them a part of the new policy, the reinsurer would forfeit such policy for a breach of warranty based upon false statements in the medical examination, although it was not made part of the original policy, and was not in itself a warranty.

*Western Indemnity Co. v. Couch*, 684, 701 (7).

19. *Life Insurance.—Forfeiture of Policy.—Estoppel.*—An insurance company is estopped to declare a forfeiture of an insurance contract, if with full knowledge of the facts, it states to the beneficiary or causes him reasonably to believe that it does not intend to stand upon the right of forfeiture, and by such representations causes the beneficiary to do any act entailing expense and trouble upon the belief that the company has waived such right.

*Western Indemnity Co. v. Couch*, 684, 711 (13).

20. *Life Insurance.—Forfeiture of Policy.—Misrepresentation.—Health of Insured.—Refusal of Insurance.*—A false answer by an applicant for insurance that he had never been rejected by, or

**INSURANCE—Continued.**

refused insurance in, any other company, in the absence of waiver or estoppel, renders the policy voidable at the election of the insurer, even though the statement is treated as a representation and not as a warranty.

*Western Indemnity Co. v. Couch*, 684, 703 (8).

21. *Life Insurance.—False Warranties.—Forfeiture of Policy.*—Where insured, in his application for insurance, warranted that he had never been refused insurance, the falsity of that warranty was sufficient to avoid the policy.

*Western Indemnity Co. v. Couch*, 684, 711 (14).

22. *Life Insurance.—Insurer's Refusal to Accept Premium.—What Constitutes.—Necessity of Tender.*—Where the holder of a fraternal benefit certificate of life insurance elected to accept a certain option to pay \$6.50 per month in cash and have the balance of the monthly assessment of \$11.30 charged against his insurance, a notice received the month following such election from the secretary of his local lodge which stated, "You will please and send remittance on this policy at once so I can send it in, \$11.30 Eleven Dollars and Thirty Cents," did not constitute a refusal on the part of insurer to accept anything less than the full amount of \$11.30 in cash, so as to make it unnecessary for insured to tender the \$6.50 required under his option.

*Supreme Lodge, etc. v. Guess*, 682.

23. *Life Insurance.—Action on Policy.—Question of Law.—Construction of Policy.*—In an action against a reinsuring company on a life policy issued by it, where both the original policy and the ones sued on and the reinsurance contract are set out in the pleadings, it is a question of law whether the incontestable clause in the original policy became a part of the policy issued by defendant. *Western Life Indemnity Co. v. Couch*, 684, 697 (2).

24. *Life Insurance.—Action on Policy.—Reply.—Sufficiency.*—In an action on a life policy, where the insurer answered that insured had falsely warranted that he was in good health and had never previously been refused insurance, and that, if it had known that insured was afflicted with a certain disease, which he fraudulently concealed, the policy would not have been issued, a reply alleging knowledge by the insurer that insured had previously applied for insurance, but not knowledge of the refusal of insurance, or of his disease, was insufficient as against demurrer.

*Western Life Indemnity Co. v. Couch*, 684, 698 (4).

25. *Life Insurance.—Action for Cash Surrender Value of Policy.—Instructions.*—In an action against an insurance company for the cash surrender value of a life insurance policy which required a "surrender of the policy and all claims hereunder" as a condition precedent to insured's obtaining such cash surrender value, an instruction that before insured was entitled to the surrender value of the policy, he must have made such a complete and definite surrender of the policy as that he had no further interest or claims against the defendant by reason of the policy, was erroneous, since it did not measure the rights of insured by the terms of the contract.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 481 (5).

26. *Life Insurance.—Action for Cash Surrender Value of Policy.—Policy Conditions.—Written Request.*—Where a life insurance policy provided for the payment of the cash sur-

**INSURANCE—Continued.**

render value of the policy upon receipt of a written request from insured, an instruction that the deposit in the mail of a letter properly stamped and addressed and containing such request was sufficient, was erroneous as altering the rights given insured under the contract.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 482 (7).

27. *Life Insurance.—Action for Cash Surrender Value of Policy.—Instructions.*—In an action by insured against an insurance company to recover the cash surrender value of a life insurance policy which required a full and valid surrender of the policy and all claims thereunder as a condition precedent to insured's obtaining such cash surrender value, an instruction that, if insured offered to surrender the policy and such offer was subject to a suggestion of defendant as to what to do with the policy, and insured was not so advised, the insurer would be liable, was erroneous as not limiting the rights of insured to those acquired under the policy.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 481 (6).

28. *Life Insurance.—Action for Cash Surrender Value—Breach of Policy Conditions.—Failure to Surrender Policy.—Statutes.*—In view of §4622a, cl. 10, Burns 1914, Acts 1909 p. 251, providing for extended insurance upon default in premium payment after three years, or payment of cash surrender value upon surrender of the policy by insured at the company's home office, and a clause in the policy stipulating for payment of cash value upon default and "a full and valid surrender" of the policy, a letter by insured to the insurer notifying it that he elected to pay no further premiums, and desired payment of the cash surrender value due on the policy, without actually surrendering the policy, was insufficient.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 480 (3).

29. *Life Insurance.—Policies Payable to Estate.—Assignment by Insured.*—Where a life policy is payable to insured's estate, he can make an assignment thereof either orally or in writing.

*Brown v. Farmers' State Bank*, 182 186 (2).

30. *Life Insurance.—Rights of Beneficiary.*—The beneficiary in an ordinary life insurance policy has a vested interest therein, which cannot be changed without his consent.

*Brown v. Farmers' State Bank*, 182, 186 (1).

31. *Life Insurance.—Reinsurance Contract.—Imposing Conditions on Policyholders.*—A life insurance company which contracted with another company to reinsure the latter's policyholders had no legal right to charge liens against a policy in the other company, or to increase the holder's annual premium, and such policyholder had the right to stand on his contract for insurance as evidenced by his original policy.

*Federal Life Ins. Co. v. Masam*, 266, 277 (2).

32. *Life Insurance.—Reinsurance.—Breach of Policy Conditions.—Rights of Policyholder.*—Where a life insurance company entered into a contract under which it acquired the assets of another company and agreed to reinsure its policyholders, but refused to carry out a policy or to continue the insurance in force unless the holder of such policy ratified illegal liens charged against and paid an increased amount of premium wrongfully demanded of him, such action was a breach of the reinsurance contract and a repudiation of the policy giving the holder the right to elect the remedy invoked by him of

**INSURANCE—Continued.**

treating the contract as breached and suing to recover the damages sustained by him on account thereof.

*Federal Life Ins. Co. v. Mazam*, 266, 278 (3).

33. *Life Insurance.—Surrender of Policy.—Consent of Beneficiary.*—Under a life policy providing that insured would be paid the cash surrender value of the policy, under certain conditions, on a full and valid surrender of the policy being made by insured, the beneficiary named in the policy is a necessary party to such surrender.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 479 (2).

34. *Tornado Insurance.—Action.—Pleading.—Condition Precedent.—Right to Repair.*—Where a tornado policy provided that the insurer reserved the right, if so elected, to repair, rebuild or replace any property damaged or destroyed, the insurer, in order to avail itself of the defense that insured, by repairing the damaged property, breached the policy, must plead an election to exercise an option to repair, or facts excusing the failure to elect, since such option is a condition precedent to insurer's right to repair.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 328 (5).

35. *Tornado Insurance.—Action on Policy.—Verdict.—Answers to Interrogatories.*—In an action on a tornado policy, involving the question whether there was a windstorm within the terms of the policy at the time of damage to plaintiff's property, defendant's motion for judgment on answers to interrogatories showing that the wind blowing at the time insured's property was damaged was a usual wind at that season of the year in the locality in question, and that wind of much greater velocity at such time of the year was of frequent occurrence, was properly overruled, where the general verdict was for plaintiff and such answers were nullified by answers to other interrogatories finding that the wind attained velocity greater than twenty-eight to thirty miles per hour, and that a wind of that velocity was unusual.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 331, 332 (11).

36. *Tornado Insurance.—Action on Policy.—Evidence.—Velocity of Wind.—Competency.*—In an action on a tornado policy, evidence of the velocity of the wind at about the hour of the damage to plaintiff's property at a point three and one-half miles from the place where plaintiff's property was located was properly admitted, the distance of the witness from plaintiff's property bearing on the weight of his testimony rather than its competency.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 331 (9).

37. *Tornado Insurance.—Construction of Policy.—Windstorm.*—A windstorm, within the terms of an insurance policy indemnifying insured against loss or damage to property by windstorm, cyclone or tornado, takes its meaning from the words "tornado" and "cyclone," with which it is associated, and should be construed as something more than an ordinary gust of wind, no matter how prolonged, and, although it need not have either the twirling or whirling features which usually accompany tornadoes or cyclones, it must assume the aspect of a storm.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 331 (12).

**INTENTION—**

Giving effect to, see **WILLS** 12, 13, 15.

**INTERROGATORIES—**

See TRIAL 23-29.

Review, see APPEAL 70, 71, 76, 89-91, 93.

**INTOXICATING LIQUORS—**

1. *Damages.—Sale of Liquor.—Directing Verdict.—Evidence.*—In an action against a liquor seller for death caused by an intoxicated person, where there was evidence, though wholly circumstantial, which would have warranted the jury in finding that defendant sold the liquor to the person causing the death, as averred in the complaint, the trial court was not justified in directing a verdict for defendant solely on the ground that there was no evidence to support that particular averment.

*Drury, Gdn., v. Krogman*, 607, 612 (1).

2. *Illegal Sales.—Injury to Means of Support.—Death of Mother.—Right of Children to Recover Damages.—Statutes.*—Even though §20 of the act of March 17, 1875, §5323 R. S. 1881, which was §8355 Burns 1908, giving any person injured in his means of support on account of the use of intoxicating liquor illegally sold a right of action against the seller, was not repealed by the act of March 4, 1911 (Acts 1911 p. 244, §8323d *et seq.* Burns 1914), children surviving a mother who was shot and killed by an intoxicated person could not recover from the one who sold the liquor, in an action based on the theory that they had been damaged in their means of support, where they and the mother lived with the father as members of a common family, since it was the father's duty, and not that of the mother, to support the children, and he was entitled to the services of the wife.

*Drury, Gdn., v. Krogman*, 607, 613 (4).

3. *Revocation of Liquor License.—Liability for Attorney's Fees.—Bond.—Statute.*—In a proceeding to revoke a liquor license, a bond filed with the complaint, and conditioned that plaintiff shall pay all costs and charges if the license is not revoked, as required by §8323y Burns 1914, Acts 1911 p. 244, does not require the payment of attorney's fees incurred in defending the action.

*State, ex rel. v. Freiberg*, 1, 3, 4 (2).

**JUDGMENT CREDITOR—**

Definition, see SALES 2.

**JUDGMENT—**

See also APPEAL 4, 5, 7, 16, 37, 83, 103; MOTIONS.

Final, see APPEAL 1, 2.

1. *Default.—Setting Aside.—Application.—Sufficiency.*—In a proceeding under §405 Burns 1914, §306 R. S. 1881, to set aside a default judgment rendered in an action on an accident insurance policy, uncontradicted facts set forth in defendant's application for relief held to show a meritorious defense, and that failure to appear and defend was due to defendant's excusable neglect within the terms of the statute.

*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 219, 221 (6).

2. *Default.—Setting Aside.—Excusable Neglect.*—What constitutes excusable neglect within the meaning of §405 Burns 1914, §306 R. S. 1881, providing that a party may be relieved from a judgment taken against him through excusable neglect, is to be determined from the particular facts of each case, and, where there is any doubt as to the sufficiency of the showing of excusable neglect and inadvertence, the doubt should be resolved in favor of the application.

*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 221 (7).

**JUDGMENT—Continued.**

3. *Default.—Setting Aside.—Pleading.*—Even if it was necessary that a proceeding under §405 Burns 1914, §396 R. S. 1881, for relief from a default should be instituted by complaint or petition, where commenced after term, defendant's motion to set aside a default, supported by affidavits, filed after term, to which application plaintiff appeared after due notice, will be treated as a complaint or petition.  
*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 218 (5).
4. *Default.—Setting Aside.—Statute.—Liberal Construction.*—Section 405 Burns 1914, §396 R. S. 1881, relative to setting aside judgments taken through defendant's mistake, inadvertence, surprise, or excusable neglect, is remedial, and must be liberally construed and applied.  
*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 217 (3).
5. *Default.—Setting Aside.—Statute.—Duty of Court.*—Under §405 Burns 1914, §396 R. S. 1881, it is the imperative duty of the court to set aside a default and permit a trial upon the merits, when it appears from the uncontradicted facts of the application for relief that the defaulted party has a meritorious defense, and that his failure to appear and defend was due to his excusable neglect.  
*Indiana Travelers,' etc., Assn. v. Doherty*, 214, 218 (4).
6. *Relief From.—Statute.—Scope and Applicability.*—Section 405 Burns 1914, §396 R. S. 1881, providing that parties may be relieved from judgments taken against them through mistake, inadvertence, surprise, or excusable neglect, does not apply to special proceedings, unless made applicable thereto by the statute authorizing such proceeding.  
*Jefferson Hotel Co. v. Young*, 172, 180 (5).

**JUDICIAL NOTICE—**

See EVIDENCE.

**JURISDICTION—**

Of estate, see BANKRUPTCY 2.

Of cause transferred from Supreme to Appellate Court, see COURTS 2.

**JURY—**

Province of, see CARRIERS 8, 13; EVIDENCE 5; NEGLIGENCE 4.

*Right to Trial by Jury.—Action on Note.*—In an action by attorneys to recover for professional services rendered in a suit for divorce, although plaintiffs could have had an equitable lien, under a complaint containing proper averments upon a note given by the husband in settlement of property rights and delivered by defendant to plaintiffs without indorsement, yet where they alleged that the note was assigned as collateral security to secure the sum due for legal services, the case was triable by jury.  
*Bruce v. Hubbell*, 237, 240 (1).

**LABORERS—**

See MASTER AND SERVANT.

**LAST CLEAR CHANCE—**

Doctrine, application, see RAILROADS 9.



**LEASES—**

Oil and gas, forfeiture, see **MINES AND MINERALS**.

**LEGISLATIVE POWER—**

Custody of children, see **INFANTS 2**.

**LETTERS—**

Contents, parol testimony, admissibility, see **EVIDENCE 8**.

**LIENS—**

See **MECHANICS' LIENS; TOWNS**.

Equitable, for attorneys' fees, see **JURY; VENDOR AND PURCHASER**.

**LIFE ESTATES—**

Creation of, devise, see **WILLS 4**.

**LIFE INSURANCE—**

See **INSURANCE 13-33**.

**MARRIAGE—**

Restraint, condition, statute, see **WILLS 1**.

**MASTER AND SERVANT.**

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|------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| <p><b>I. THE RELATION—CREATION AND EXISTENCE, 1-8.</b></p> <p><b>II. INJURIES TO SERVANT—NEGLIGENCE—LIABILITY, 9-27.</b></p> | <p><b>III. WORKMEN'S COMPENSATION, 28-50.</b></p> |
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**I. THE RELATION—CREATION AND EXISTENCE.**

1. *Contract of Employment.—Requisites.—Definiteness as to Parties.*—It is essential that a contract of employment be definite and certain as to parties. *Rogers v. Rogers, 659, 669 (7).*
2. *Contract.—Creation of Relationship.—Conduct.*—The relation of employer and employe is contractual and is a product of the meeting of the minds, and to create such relation there must be an express contract or such acts as will unequivocally show that the parties recognize one another as master and servant. *Rogers v. Rogers, 659, 668 (6).*
3. *Dismissal of Employe.—Disobedience.*—Generally, an employe's disobedience to the master's orders justifies a rescission of the contract of service and a peremptory dismissal. *Rogers v. Rogers, 659, 668 (4).*
4. *Duty of Employe.—Obedience to Orders.*—It is the duty of an employe to obey all reasonable orders and instructions of his employer. *Rogers v. Rogers, 659, 668 (3).*
5. *Duties of Servant.—Rights of Master.*—It is the exclusive province of the master to determine the advisability of directing an employe to perform a certain duty and whether the performance of that duty would inure to the benefit of the business. *Rogers v. Rogers, 659, 667 (2).*
6. *Independent Contractor.—Answers to Interrogatories.—Effect.*—In an action for injuries sustained by one who, while traveling upon a public street, was kicked by a horse used in defendant's business, but owned by a third person, the jury's answers to certain interrogatories held not to show conclusively that the owner was an independent contractor, when the answers to such interrogatories were considered in connection with further answers. *Washburn-Crosby Co. v. Cook, 463, 467 (5).*

**MASTER AND SERVANT—Continued.**

7. *Independent Contractor.—Personal Injuries.—Liability.—Evidence.*—In an action for personal injuries, where plaintiff alleged that he was kicked by a horse used in defendant's business, and, though known by defendant to be vicious and dangerous, the horse was negligently left in a street to be fed, with no one to control or manage him, evidence showing defendant's participation in the keeping, use and control of the horse, though owned by another, and that defendant knew of the vicious nature of the animal and of the custom of feeding it in the street where plaintiff was injured, was sufficient to sustain a general verdict for plaintiff, it not being essential to a recovery to show that defendant had exclusive control of the horse.

*Washburn-Crosby Co. v. Cook*, 463, 469 (8).

8. *Independent Contractor.—Injury to Employees.—Liability.*—Mere knowledge that, in the construction of a building, a scaffold would be necessary and permission to build it, on the part of the owner and the general contractor, is not sufficient to make them liable for injuries sustained by an employee of an independent subcontractor injured by the fall of a scaffold erected by such subcontractor, in the absence of facts pleaded showing a duty on the part of the owner and the general contractor to inspect and test the material used, etc.

*Mackey v. Lafayette, etc., Trust Co.*, 59, 67 (5).

**II. INJURIES TO SERVANT—NEGLIGENCE—LIABILITY.**

9. *Action.—Complaint.—Sufficiency.*—In an action by a glass-blower against a glass company for personal injuries, paragraphs of complaint alleging that plaintiff's eyes were injured through defendant's negligence in permitting poisonous dust and fumes to escape from its mixing room into the room where plaintiff was working, and by reason of being exposed to intense radiated heat, against which plaintiff was not instructed how to protect himself, *held* good as against demurrer.

*McBeth-Evans Glass Co. v. Brunson*, 513, 515 (1).

10. *Action.—Evidence.—Sufficiency.*—In an action for the death of a packing-house employe killed in an unguarded hog-scraping machine, evidence *held* sufficient to justify a finding that deceased slipped and fell into the machine while stooping over to take something from under it, and that, if the machine had been guarded, the accident would not have happened.

*Kingan & Co. v. Albin, Adm.*, 493, 512 (16).

11. *Action.—Instruction.—Negligence.—Invading Province of Jury.*—In an action against a glass company by a glass-blower for injuries to his eyes from exposure to intense heat, an instruction that the company was guilty of negligence in ordering plaintiff to work where his eyes were subjected to such heat when he was in a "run-down condition of health," *held* erroneous as informing the jury that the giving of such order, under the circumstances alleged in the complaint, was negligence *per se*, whereas the question was one of fact for the determination of the jury. *McBeth-Evans Glass Co. v. Brunson*, 513, 525 (7).

12. *Action.—Instructions.—Contributory Negligence.*—In an action by a glass-blower for personal injuries, an instruction that the jury must find, before they would be warranted in returning a verdict for plaintiff, that he had no knowledge that breathing the poisonous dust, gases and fumes, which injured his general health and caused cataracts to form on his eyes, was injurious to him, was not erroneous as omitting the element of contributory

**MASTER AND SERVANT—Continued.**

negligence, since, without knowledge of the effect of the dust etc., on his health, plaintiff could not have been guilty of contributory negligence in continuing his work.

*McBeth-Evans Glass Co. v. Brunson*, 513, 523 (3).

13. *Action.—Instructions.—Ignoring Issues.—Proximate Cause.*—In an action by a glass blower against a glass company for injuries alleged to have been caused by defendant's negligence in permitting poisonous dust and fumes to escape from its mixing-room into the room where plaintiff was working, an instruction that, if plaintiff, because of such poisonous dust, had been injured in his general health, and as a result of the condition of his general health he suffered cataracts of the eyes, though not expressly stating that the jury must find the condition of plaintiff's health resulting in cataracts was produced by the poisonous gas, etc., *held* neither misleading nor objectionable as directing a particular verdict for plaintiff upon presupposed acts of negligence therein set forth and omitting the essential element of proximate cause.

*McBeth-Evans Glass Co. v. Brunson*, 513, 522 (2).

14. *Answers to Interrogatories.—Contributory Negligence.*—In an action for the death of a packing-house employe killed in a hog-scrapping machine, answers to interrogatories showing that the accident was caused by deceased being struck by an iron bar, but not showing what he was doing at the time, *held* not to show that he was guilty of contributory negligence.

*Kingan & Co. v. Albin, Adm.*, 493, 508 (5).

15. *Contributory Negligence.—Burden of Proof.*—In an action against the master for the wrongful death of a servant, the burden of proving contributory negligence is on the master.

*Kingan & Co. v. Albin, Adm.*, 493, 508 (11).

16. *Dangerous Occupation Act.—Construction.—Scope.*—Section 4 of the Dangerous Occupation Act (Acts 1911 p. 597, §3862a *et seq.* Burns 1914), making it the duty of all owners, contractors and subcontractors engaged in the construction of any building to see that all scaffolding, appliances, etc., are carefully selected and tested for the safety of employes, applies only to the particular person in charge of the work, and does not take away the independent-contractor defense.

*Mackey v. Lafayette, etc., Trust Co.*, 59, 65 (2).

17. *Employers' Liability Act.—Applicability.—Instructions.*—In an action for the death of a servant based on the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), an instruction that the act applied, if defendant was employing five or more men in its business, was not subject to the objection that it informed the jury that the employment of five or more men was the only prerequisite to the application of the act, where the uncontradicted evidence showed that defendant was operating a large coal mine, and employed more than 250 men in the mining and marketing of its coal, and other instructions informed the jury that there could be no recovery under the act unless it was shown by a preponderance of the evidence that the employe met his death as a result of defendant's negligence, as charged in the complaint. *Deep Vein Coal Co. v. Ward, Adm.*, 161, 164 (3).

18. *Employers' Liability Act.—Use of Defective Equipment.*—Under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), the mere fact that an injured servant uses

**MASTER AND SERVANT—Continued.**

defective equipment, accompanied by apparent danger in some degree, is not conclusive on the question of contributory negligence, as the conditions may be such that reasonable minds might differ as to the feasibility of safely encountering such danger, or such that any person of reasonable prudence might believe that it could be safely encountered.

*Vandalia R. Co. v. Fry*, 85, 90 (7).

19. *Employers' Liability Act.—Defective Equipment.—Contributory Negligence.—Jury Questions.*—In an action under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), whether the injured servant was guilty of contributory negligence in using certain equipment, claimed to be openly and obviously defective, held in view of the evidence to be a question for the jury.

*Vandalia R. Co. v. Fry*, 85, 91 (8).

20. *Employers' Liability Act.—Negligence of Fellow Servant.—Transitory Danger.*—Under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), the master is chargeable with the negligence of a servant in the discharge of a duty owing to his master, which creates a transitory danger resulting in an injury to a fellow servant.

*Vandalia R. Co. v. Fry*, 85, 92 (9).

21. *Employers' Liability Act.—Negligence of Fellow Servant.*—under the Employers' Liability Act (Acts 1911 p. 145, §§8020a-8020k Burns 1914), the failure of a fellow servant to exercise reasonable care is deemed to be a breach of duty on the part of the master.

*Vandalia R. Co. v. Fry*, 85, 90 (6).

22. *Employe of Independent Contractor.—Liability for Injury.*—Where an employe of a subcontractor was injured by the falling of a defective scaffold, which had been constructed by a fellow servant and the foreman employed by the subcontractor, the injured employe could not recover against the owner and general contractor in an action based on §4 of the Dangerous Occupation Act (Acts 1911 p. 297, §3862a *et seq.* Burns 1914), where it affirmatively appeared from the complaint that plaintiff's employer was an independent contractor, and no facts were alleged showing that defendants were guilty of personal negligence causing the injury.

*Mackey v. Lafayette, etc., Trust Co.*, 59, 65 (3).

23. *Failure to Guard Dangerous Machinery.—Negligence Per Se.*—Failure to guard a dangerous machine, as required by statute, where it is practicable to do so without destroying its usefulness, generally constitutes negligence *per se.*

*Kingan & Co. v. Albin, Adms.*, 493, 502 (4).

24. *Failure to Guard Dangerous Machinery.—Directing Verdict.*—In an action for the death of a packing-house employe killed in a hog-scraping machine alleged not to have been guarded as required by statute, the refusal of the court to direct a verdict for plaintiff was proper, where the evidence conclusively showed that the machine was not guarded, and that it could have been guarded without interfering with its usefulness.

*Kingan & Co. v. Albin, Adms.*, 493, 508 (10).

25. *General Verdict.—Answers to Interrogatories.*—In an action for the death of a packing-house employe, killed in a hog-scraping machine, where the general verdict was for plaintiff, the jury's answers to interrogatories cannot be construed as showing that the voluntary act of the deceased was the proximate cause of

**MASTER AND SERVANT—Continued.**

his death in the absence of any findings disclosing how the accident happened.

*Kingan & Co. v. Albin, Adm.*, 493, 501, 503 (3).

26. *Negligence.*—If a glass company had no actual knowledge that poisonous gases and dust which it permitted to escape from its mixing room were injurious to employes, but by the exercise of reasonable care could have learned such fact, and yet allowed the partition between the mixing room and an adjoining one to become in disrepair, so that dust and gases passed through into the other room and affected workmen therein employed, the company was negligent in not ascertaining the facts as to the percolation of gas and dust, and in permitting further unnecessary exposure of its employes thereto.

*McBeth-Evans Glass Co. v. Brunson*, 513, 525 (6).

27. *Negligence.—Failure to Comply with Statute.*—If a glass company knew of the poisonous nature and deleterious effect of gases and dust which it allowed to escape from its mixing room, and permitted the continued exposure of workmen thereto, it was negligent, as a matter of law, under §3862d Burns 1914, Acts 1911 p. 599.

*McBeth-Evans Glass Co. v. Brunson*, 513, 524 (5).

**III. WORKMEN'S COMPENSATION.**

28. *Appeal.—Review of Award.—Time for Filing Application.—Failure to Receive Notice of Award.*—Where the Industrial Board mailed a copy of an award to an employer, but the copy was never received, such failure, in the absence of a showing that it was chargeable to any omission of duty on the part of the board, would not excuse the employer from complying with §60 of the Workmen's Compensation Act (§8020r2 Burns' Supp. 1918, Acts 1917 p. 154), requiring that an application for a review of an award must be made within seven days from the date thereof.

*Jefferson Hotel Co. v. Young*, 172, 178 (2).

29. *Appeal.—Review of Award.—Time for Filing Application.*—Under §§50, 60 of the Workmen's Compensation Act (§§8020q2, 8020r2 Burns' Supp. 1918, Acts 1917 p. 154), a party desiring a review of an award by the full board must make application therefor within seven days from the date of the award, regardless of when he receives a copy of the award which the act provides shall be sent to him.

*Jefferson Hotel Co. v. Young*, 172, 178 (3).

30. *Appeal.—Review of Award.—Waiver of Statute by Applicant.*—Although the Industrial Board retains jurisdiction over the subject-matter of an applicant's claim for certain purposes after an award, it has no jurisdiction to review the same without compliance with §60 of the Workmen's Compensation Act (8020r2 Burns' Supp. 1918, Acts 1917 p. 154), requiring an application for review of an award to be made within seven days of the date thereof, and an applicant for compensation cannot waive such compliance and confer jurisdiction by consent.

*Jefferson Hotel Co. v. Young*, 172, 180 (4).

31. *Appeal.—Review of Award.*—Even though §405 Burns 1914, §396 R. S. 1881, applied to proceedings under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918), it would not authorize the Industrial Board to extend the time for filing an application for review of an award beyond the period definitely fixed by §60 of the act.

*Jefferson Hotel Co. v. Young*, 172, 181 (6).

## MASTER AND SERVANT—Continued.

32. *Appeal.—Review of Award.—Diligence.*—Even if the Industrial Board possessed discretionary power to hear and determine an application for review of an award after the expiration of the seven-day period provided in §60 of the Workmen's Compensation Act. (§8020r2 Burns' Supp. 1918, Acts 1917 p 154), the fact that the board's secretary informed the employer that a review could not be had would not justify a delay of three weeks in fixing an application for a review.  
*Jefferson Hotel Co. v. Young*, 172, 181 (7).
33. *Appeal.—Review.—Evidence.*—In a proceeding for compensation for the death of a workman killed by the overturning of an automobile which he was driving at the direction of a member of a firm which employed him, wherein it was contended that at the time of his death decedent was performing a service for such firm member and not for the firm, evidence held to show that deceased was in his regular and usual employment for the firm at the time of the accident. *Rogers v. Rogers*, 659, 670 (9).
34. *Casual Employment.*—Though §9 of the Workmen's Compensation Act expressly excepts casual laborers from the compensatory provisions of the law, yet, under §76, clause b, of the act, an injured workman may recover compensation, even though his employment is casual, if the employment is in the usual course of the employer's business. *Caca v. Woodruff*, 93, 96 (1).
35. *Contract of Employment.—Compensation.*—In view of §4 of the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918), the obligation of the employer to pay, and the right of the employe to receive, compensation in accordance with the provisions of such act, becomes a part of every contract of service between every employer and employe covered by this act. *Rogers v. Rogers*, 659, 669 (8).
36. *Construction.—Injuries Arising Out of and in Course of Employment.*—Workmen's compensation acts should be given a broad and liberal construction in determining whether an accident producing an injury arose out of and in course of the employment. *Granite Sand, etc., Co. v. Willoughby*, 112, 115 (1).
37. *Death Arising Out of Employment.*—Where a servant was killed by the accidental overturning of an automobile while conveying workmen from one camp to another at the direction of a member of the firm employing him, a duty which was frequently performed by him, the death arose out of the employment. *Rogers v. Rogers*, 659, 665 (1).
38. *"Employe."*—"Usual Course of Employment."—Since additions and repairs to buildings and machinery are necessary to the proper conduct of the milling business, the constructing and making of such additions and repairs is employment "in the usual course of the employer's business" within the meaning of §76 of the Workmen's Compensation Act, defining "employe."  
*Caca v. Woodruff*, 93, 96 (2).
39. *Employment of Son by Father.—Proceedings for Compensation.—Presumption.*—The fact that deceased was an adult son of a member of the employing firm creates no presumption affecting proceedings against the firm for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918) for the son's death. *Rogers v. Rogers*, 659, 670 (10).
40. *Employe's Wilful Misconduct.—Evidence.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l

## MASTER AND SERVANT—Continued.

*et seq.* Burns' Supp. 1918), for compensation for the death of a lineman electrocuted by coming in contact with a live wire, evidence that decedent was guilty of contributory negligence, and that decedent violated certain rules of the employer which were enforced with little or no diligence and were left largely to the option and discretion of the employes for their enforcement, *held* insufficient to show wilful misconduct on the part of deceased within §8 of the act, it being necessary to show intentional disobedience to a strictly enforced rule to establish wilful misconduct.

*Indianapolis Heat, etc., Co. v. Fitzwater*, 422, 427 (3)

41. *Employee's Wilful Misconduct.—Burden of Proof.*—In a proceeding for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918), the burden of showing that the employee's injury resulted from wilful misconduct within §8 of the act is upon the employer.

*Indianapolis Heat, etc., Co. v. Fitzwater*, 422, 427 (2).

42. *Findings of Industrial Board.—Conclusiveness.*—There being substantial evidence sufficient to support the facts found by the Industrial Board, such finding must stand.

*Indianapolis Heat, etc., Co. v. Fitzwater*, 422, 428 (4).

43. *Findings of Industrial Board.—Conclusiveness.*—The findings of the Industrial Board must be upheld on appeal unless they are not warranted by the evidence.

*Indianapolis Heat, etc., Co. v. Fitzwater*, 422, 424 (1).

44. *Findings of Industrial Board.—Sufficiency to Sustain Award.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918) the Industrial Board must find as a legal basis for an award that claimant was an employe, that he received an injury by accident, that the accident arose out of and in course of the employment, the character and extent of the injury, and claimant's average weekly wage, and a finding of facts failing to show that the injury complained of, and upon which an award is based, arose out of the employment is insufficient to sustain such award.

*Muncie Foundry, etc., Co. v. Thompson*, 157, 161 (2).

45. *Independent Contractor.—Employee.*—A worker engaged by a foundry company to unload coke from freight cars for a stipulated sum per ton was an employe and not an independent contractor, where there was no contract fixing the number of cars to be unloaded or the period of time he was to be so employed, and he could cease labor at any time without incurring liability or could be discharged without being entitled to damages.

*Muncie Foundry, etc., Co. v. Thompson*, 157, 159 (1).

46. *Independent Contractor.—"Usual Course of Business."*—A carpenter engaged at different times in building an addition, and in making repairs, to a mill under the supervision of the owner, for which he was paid weekly at a fixed price per hour, the owner furnishing materials, was an "employe" within the meaning of §76 of the Workmen's Compensation Act, and not an independent contractor, such work being in the usual course of the milling business.

*Oaca v. Woodruff*, 93, 97 (3).

47. *Notice of Award.*—Under §§59, 60 of the Workmen's Compensation Act (§§8020q2, 8020r2 Burns' Supp. 1918, Acts 1917 p. 154) the Industrial Board is not required to "serve" notice of an award on the parties, and any means ordinarily employed in

**MASTER AND SERVANT—Continued.**

sending papers, including transmission by mail, express or messenger, is sufficient to meet the requirements of the act.

*Jefferson Hotel Co. v. Young*, 172, 178 (1).

48. *Injuries to Servant.—Injuries in Course of Employment.*—An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), when it occurs within the period of the employment at a place where the employe may reasonably be, and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it.

*Granite Sand, etc., Co. v. Willoughby*, 112, 115 (2).

49. *Injuries to Servant.—Injuries Arising Out of and in Course of Employment.*—Where an employe, engaged in picking out sticks and foreign substances from gravel loaded into railroad cars by the employer, remained in a car while it was being moved away from the loading chute in order to permit the removal of a loaded car, and was thrown out of such car while it was being switched, the accident causing the injury arose out of and in course of the employment.

*Granite Sand, etc., Co. v. Willoughby*, 112, 115 (3).

50. *Performance of Duty at Master's Order.—Estoppel.*—Where an employe of a firm of contractors was killed by the overturning of an automobile while conveying a workman to a certain camp, at the direction of a member of the firm, such service being of the kind deceased was accustomed to perform, the employer will be estopped from claiming that the employe was acting for the private benefit of an individual member of the firm.

*Rogers v. Rogers*, 659, 663 (5).

**MATERIALMEN—**

See **MECHANICS' LIENS 3; TOWNS 1.**

Recovery on construction bond, see **HIGHWAYS.**

**MECHANICS' LIENS—**

1. *Foreclosure.—Interest on Claims.—Burden of Proof.*—In an action to foreclose a mechanic's lien, if plaintiff believed it was entitled to recover interest on its claims, the duty rested upon it to establish that fact by the evidence, and to furnish proper data from which the amount thereof could be computed.

*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 489 (6).

2. *Lien of Subcontractor.—Defenses.—Removal of Material Furnished.*—Where, in a subcontractor's action to foreclose a mechanic's lien, defendant set up that plaintiff was in fact a partner of the principal contractor and was to share in the profits of the principal contract, and had guaranteed that the appliance to be installed in defendant's factory would do the work for which it was sold, it was a defense that the materials furnished by plaintiff had been removed, as not complying with the guaranty.

*Coonse, etc., Ice Co. v. Home Stove Co.*, 226, 232 (4).

3. *Subcontractors and Materialmen.—Right to Lien.*—The mechanics' lien statute gives to the subcontractor, laborer and materialman an absolute lien for material, or labor, and such lien is not affected by the mere failure of the principal contractor to perform his contract, or by the cancellation or rescission thereof, or by the removal of the work or payment of the principal contractor.

*Coonse, etc., Ice Co. v. Home Stove Co.*, 226, 229 (1).



**MEMORANDUM—**

To demurrer, sufficiency, see PLEADING 11.

**MENTAL SUFFERING—**

Ejectment of passengers, damages, see CARRIERS 6.

**MINES AND MINERALS—**

1. *Leases.—Equitable Relief.—Burden of Proof.*—A lessor of mining property seeking a forfeiture of the lease because of the lessee's failure to make stipulated payments, has the burden of showing that there is no adequate legal remedy.

*Rembarger v. Losch*, 98, 103 (4).

2. *Leases.—Forfeiture.—Equitable Relief.—Adequate Legal Remedy.*—To entitle a lessor of mining property to equitable relief by way of forfeiture or cancellation of the lease for the lessee's failure to make stipulated payments, it must appear that there is not an adequate remedy in damages, since equity will not interfere where there is an adequate remedy at law.

*Rembarger v. Losch*, 98, 103 (3).

3. *Oil and Gas Leases.—Forfeiture.*—Rights acquired in land by an oil and gas lessee, by reason of his exploration and development of the land, will not be forfeited unless it clearly appears that it would be inequitable to permit the lessee to assert longer such interest.

*Rembarger v. Losch*, 98, 103 (6).

4. *Oil and Gas Leases.—Forfeiture.—Adequate Legal Remedy.*—Though provisions for forfeiture in an oil and gas lease are for the benefit of the lessor and are more strictly enforced than such provisions in ordinary leases, yet, where a lessee had acquired an interest in the land by reason of his exploration and development thereof under a lease containing forfeiture provisions for the failure to make stipulated payments, or to furnish the lessor with gas for household purposes, and time was not made the essence of the contract, the failure to perform such provisions did not work a forfeiture, since in such case equity regards the payment or performance as the real or principal intent and the forfeiture merely as an accessory, and will not enforce the forfeiture, as the lessor could be adequately compensated in damages.

*Rembarger v. Losch*, 98, 104 (7).

5. *Oil and Gas Leases.—Nature of Right.*—While oil and gas leases in the first instance usually grant the lessee merely the right to explore, yet, if such exploration and development is made in accordance with the lease, and oil or gas is produced, the lessee acquires an interest in the land.

*Rembarger v. Losch*, 98, 103 (5).

**MISCONDUCT—**

Of counsel, see TRIAL 2.

Willful, evidence, sufficiency, see MASTER AND SERVANT 40.

**MONEY RECEIVED—**

*Action.—Grounds.*—The action for money had and received lies whenever one person has money which legally or in equity and good conscience belongs to another.

*Krabbe v. City of Lafayette*, 428, 434 (6).

**MORTGAGES—**

See also APPEAL 64, 103; CHATTEL MORTGAGES; ESTOPPEL 2; EVIDENCE 3.

**MORTGAGES—Continued.**

1. *Assignment of Mortgage.—Foreclosure by Assignee.—Assignment of Deficiency Judgment to Assignee.—Right to Redeem.—Statutes.*—Where a mortgagee assigned a mortgage and the note secured thereby as collateral to secure the payment of his note to assignee, and, upon foreclosure by assignee, the trial court gave assignee and another creditor of mortgagee liens upon the proceeds of sale to the amount of their debts against assignee, for which sum the property was sold, mortgagee, who had only constructive knowledge of the foreclosure proceedings and to whom the unpaid balance of the personal judgment rendered against mortgagor had been assigned, was entitled to redeem the land from the sheriff's sale upon compliance with §§814, 815 Burns 1914, §§771, 772 R. S. 1881. *Kenney v. Monroe*, 379, 386 (2).
2. *Foreclosure.—Redemption by Mortgagee.*—After a mortgagee has once sold the land upon an execution or decree, he cannot redeem from his own sale, in the event that it produces less than the whole amount of the judgment, thereby restoring the lien of the judgment and subjecting the property to resale the same as if no previous sale had been made. *Kenney v. Monroe*, 379, 385 (1).

**MOTIONS—**

See also **APPEAL 3.**

To strike, office of, see **PLEADING 19.**

*Order.*—An order of court is a judgment or conclusion of the court on any motion or proceeding by which affirmative relief is granted or relief denied.

*McMullan, Admr., v. Plymouth, etc., Power Co.*, 336, 341 (7).

**MUNICIPAL CORPORATIONS—**

See also **TOWNS.**

1. *Defective Sidewalks.—Damages for Personal Injuries.—Recovery Over by City.*—Where a sidewalk is rendered unsafe by the wrongful act or negligence of a third party and the city is compelled to respond in damages for injuries resulting from the defective condition, it has a right of action against the party responsible for the condition of the sidewalk for the amount it has been compelled to pay. *Home Brewing Co. v. City of Indianapolis*, 674, 680 (3).
2. *Defective Sidewalks.—Injuries to Pedestrians.—Liability.*—Although a city is not an insurer of the safety of its streets and sidewalks, it is required to keep them in reasonably safe condition for traveling, and failing so to do, it is liable to a pedestrian, exercising reasonable care, who is injured because of defects therein. *City of New Albany v. Kiefer*, 289, 292 (2).
3. *Defective Sidewalk.—Personal Injuries.—Indemnity.—Wrongful Use of Sidewalk.—Liability.*—Where a saloonkeeper rolled beer kegs over a sidewalk to an elevator therein for a period of several years, and, as a result of the wear incident to such practice and the use of the walk by the general public, a depression was caused which resulted in injury to a pedestrian for which the city was compelled to respond in damages, the use of the sidewalk by the saloonkeeper was not wrongful so as to render him liable to the city. *Home Brewing Co. v. City of Indianapolis*, 674, 680 (5).
4. *Defective Sidewalks.—Personal Injuries.—Indemnity.—Adjudication as Against City.—Conclusiveness as Against Indemnitor.*—

**MUNICIPAL CORPORATIONS—Continued.**

*Estoppel.*—Where a city, primarily liable to a pedestrian for injuries due to a defective sidewalk, notifies the person responsible for the defect of the action against it, such person will be bound by the judgment rendered against the city, but will not be estopped from showing that he was under no obligation to keep the street in safe condition and that the accident did not occur through his fault.

*Home Brewing Co. v. City of Indianapolis*, 674, 680 (4).

5. *Streets and Sidewalks.—Duty to Repair.*—It is the duty of a city to keep its streets and sidewalks in reasonable repair and free from dangerous defects to the full width thereof.

*City of New Albany v. Kiefer*, 289, 292 (1).

6. *Streets and Sidewalks.—Duty to Repair.—Personal Injuries.—Liability.*—The duty of repairing streets and sidewalks is upon the city, and abutting property owners and persons using the street in a legitimate way are not liable to a person injured by reason of defects resulting from the use of the street, unless such use is wrongful and unlawful.

*Home Brewing Co. v. City of Indianapolis*, 674, 681 (6).

7. *Injuries to Persons.—Wrongful Act of Third Persons.—Liability of City.*—Even though a city has full power and control over a stream wherein citizens are accustomed to bathe, it is not liable for the death of a bather electrocuted by coming in contact with a live wire negligently and maliciously placed by a third person, where the city had no notice of the existence of the wire.

*Caldwell v. Alley*, 313, 323 (5).

8. *Injuries to Persons.—Wrongful Act of Third Person.*—A city cannot be charged with constructive notice that a private party has placed a live wire where persons bathing in a stream under the city's control may come into contact therewith, in the absence of evidence showing how long the wire has been so located.

*Caldwell v. Alley*, 313, 323 (4).

9. *Officers.—Money Wrongfully Acquired.—Right of City to Recover.*—Where a city authorized the city clerk to employ a deputy and appropriated \$700 for salary, and the deputy received such amount as salary, but, on the clerk's demand, turned over to him the difference between such amount and the salary he stipulated that she should receive when employed, such difference belonged to the city, and it could maintain an action for money had and received for the recovery thereof.

*Krabbe v. City of Lafayette*, 428, 432, 434 (5).

10. *Public Improvements.—Assessments.—Failure to Object.—Estoppel.*—Under §§8710, 8714 Burns 1914, Acts 1909 p. 412, where a property owner fails to avail himself of his right to object to the improvement of a street, but stands by and silently watches the completion of the work, he cannot avoid payment for the benefits he has received, even if the proceedings under which the improvement was made are void.

*Haislip v. Union Asphalt, etc., Co.*, 308.

**NEGLECT—**

Excusable, setting aside default, see JUDGMENT.

**NEGLIGENCE—**

See also CARRIERS; ELECTRICITY; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS.

**NEGLIGENCE—Continued.**

1. *Complaint.—Elements.*—Elements essential to the sufficiency of a complaint based on negligence are allegations showing the existence of a duty resting on defendant to exercise care in favor of plaintiff, and a failure on the part of defendant to discharge such duty proximately resulting in some injury or damage to plaintiff. *Pittsburgh, etc., R. Co. v. Friend*, 366, 373 (1).
2. *Complaint.—Sufficiency.—Contributory Negligence.*—Although an answer of general denial to a complaint based on negligence, in an action for personal injuries, tenders the issue of contributory negligence, the complaint is not required to negative it, and is demurrable only where its averment affirmatively shows contributory negligence.  
*Pittsburgh, etc., R. Co. v. Friend*, 366, 374 (5).
3. *Contributory Negligence.*—The negligence of an injured party, to defeat his right of recovery, must be a proximate and not a remote cause of the injury, though it is not necessary that such negligence shall have been the sole cause, but it is sufficient if it forms part of the efficient cause thereof.  
*Vandalla R. Co. v. Fry*, 85, 89 (4).
4. *Contributory Negligence.—Questions for Jury.*—While every person must use due care for his own safety when exposed to danger, and his failure to do so, or his conduct in negligently subjecting himself to peril, will ordinarily defeat a recovery for resultant injuries, yet, unless his conduct is so clearly marked by a failure to use proper care for his own safety that all reasonable minds will agree as to his imprudence, the question of contributory negligence must be submitted to the jury to be determined as an issue of fact.  
*Indianapolis, etc., Traction Co. v. Helms, Adms.*, 137, 143 (3).
5. *Independent Contractor.—Liability.*—Where one lets a contract to another to do a particular work, and retains no control over the details, means or plans by which the contract is to be executed, but looks only to the ultimate results to be obtained according to the standard agreed upon, he is not responsible for the negligence of the contractor or those who perform the work provided for in the contract.  
*Washburn-Crosby Co. v. Cook*, 463, 468 (7).
6. *Injuries to Pedestrians.—Verdict.—Answers to Interrogatories.*—In an action for injuries sustained by a pedestrian when kicked by a horse used by defendant in his business, but owned by a third person, answers to interrogatories held not in irreconcilable conflict with general verdict for plaintiff.  
*Washburn-Crosby Co. v. Cook*, 463, 468 (6).
7. *Injury Involving Act of God.—Intervention of Human Agency.—Proximate Cause.*—Where an act of God is involved in damage to person or property, but a human agency negligently applied intervenes to produce the injury, the act of God is regarded as the remote rather than the immediate cause of the injury, and recourse cannot be had to it as a legal excuse.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 415 (25).
8. *Negligence per se.—Violation of Statute.*—Where the acts and omissions complained of, in a servant's action against the master for personal injuries, were a matter of statutory duty, defendant's failure to observe the statute was negligence *per se*.  
*McBeth-Evans Glass Co. v. Brunson*, 513, 523 (4).
9. *Proximate Cause.*—Proximate cause is an act which immediately causes or fails to prevent an injury which might reason-

**NEGLIGENCE—Continued.**

ably have been anticipated would result from such negligent act or omission. *Kingan & Co. v. Albin, Adm.*, 493, 511 (15).

**NEGOTIABLE INSTRUMENTS—**

See **BILLS AND NOTES.**

**NEW TRIAL—**

See also **APPEAL** 6, 8, 9, 41, 42, 48.

1. *Grounds.*—Under the statute (§585 Burns 1914, §559 R. S. 1881), assignments that "the decision and judgment of the court are not sustained by sufficient evidence" and "because the decision and judgment of the court are contrary to law," are unauthorized and cannot be recognized as grounds for a new trial.  
*Federal Life Ins. Co. v. Masam*, 266, 286 (8).
2. *Grounds.—Excessive Damages.—Statute.—Applicability.—Torts.*—Section 585, subd. 4, Burns 1914, §559 R. S. 1881, authorizing the granting of a new trial for excessive damages, applies only in cases of torts.  
*Federal Life Ins. Co. v. Masam*, 266, 286 (9).
3. *Grounds.—Excessive Damages.—Breach of Contract.*—Section 585, subd. 5, Burns 1914, §559 R. S. 1881, authorizing a new trial for excessive recovery where the action is upon contract, was properly followed by defendant, in an action for breach of an insurance contract, in seeking a new trial on the ground that the amount of recovery was erroneous in that it was too large.  
*Federal Life Ins. Co. v. Masam*, 266, 287 (11).
4. *Grounds.—Sufficiency.*—An assignment as ground for new trial that certain enumerated special findings "are not nor are either of them sustained by sufficient evidence" is unauthorized by statute (§585 Burns 1914, §559 R. S. 1881), and insufficient.  
*Federal Life Ins. Co. v. Masam*, 266, 289 (13).
5. *Motion.—Time for Filing.*—Where a verdict was returned on April 22 and a motion for a *verdict de novo*, which was filed May 2, was overruled on June 6, a motion for new trial filed June 27 was properly overruled, since it was not filed within the time fixed by statute (§587 Burns 1914, Acts 1913 p. 848).  
*Brehm v. Hennings*, 625, 627 (1).
6. *Supplemental Motion.—Time for Filing.*—The filing of a supplemental motion for a new trial more than thirty days after the decision of the court on the merits of the cause is unauthorized, and it is not error for the court to strike it out.  
*H. W. Johns-Manville Co. v. South Shore Mfg. Co.*, 484, 486 (1).

**NOTARIES—**

Acknowledgment, certificate, sufficiency, see **ACKNOWLEDGMENT.**

**NOTES—**

See **BILLS AND NOTES.**

**NOTICE—**

To agent, effect on principal, see **INSURANCE** 2.

Holders of accommodation paper without notice, effect, see **BILLS AND NOTES.**

**NUISANCE—**

1. *Abatement.—Acquiescence.*—The doctrine of acquiescence does not apply to a nuisance unless it has continued for twenty years.  
*Overmyer v. Barnett*, 569, 583 (5).
2. *Actions.—Abatement.—Damages.—Complaint.—Sufficiency.*—In an action by a landowner to abate a nuisance created when a dam erected in the outlet of a lake caused plaintiff's premises to be flooded, and to recover damages to his land resulting therefrom, complaint *held* sufficient to state a cause for damages against defendants, but not to warrant the granting of equitable relief by way of abatement and injunction, in the absence of averments showing that defendants or any one of them were at the time maintaining the dam or had any right to remove it.  
*Overmyer v. Barnett*, 569, 584 (6).
3. *Public Nuisance.—Abatement.—Right of Action.*—Though the obstruction of the outlet of the waters of a lake created a public nuisance by reason of flooding low ground around the lake, a landowner whose premises were overflowed and whose health and property were injured thereby may maintain an action for damages and to abate the nuisance because of special injury suffered by him.  
*Overmyer v. Barnett*, 569, 582 (3).

**OFFICERS—**

1. *School Trustee.—Interference with Assumption of Office.—Right to Injunctive Relief.*—One elected to the office of school trustee is not entitled to an injunction against members of the board restraining them from preventing him from assuming the duties of his office, since the right to hold office is not a property right cognizable in a court of equity, but merely a political right not coming within the jurisdiction of a court of chancery.  
*Haupt v. Schmidt*, 260, 263 (3).
2. *Torts of Health Officer.—Liability.*—If the secretary of the state board of health, without authority, allowed or caused the outlet of the waters of the lake to be obstructed, so that a nuisance was created, he is liable as an individual for resulting damage.  
*Overmyer v. Barnett*, 569, 583 (4).

**OPINIONS—**

Construction, see **COURTS** 3.

**ORDER—**

Of court, definition, see **MOTIONS**.

**ORDINANCES—**

Municipal, compliance with, presumption, see **CARRIERS** 11.

Prescribing limits for junk yards, validity, see **COURTS** 2.

Speed, violation, negligence *per se*, see **RAILROADS** 8.

**PARENT AND CHILD—**

See also **ADOPTION**; **INFANTS**.

1. *Custody of Child.—Hearing.—Notice.*—The relation of parent and child cannot be permanently severed in a proceeding to determine the custody of the child without notice to the parent.  
*Orr v. State*, 242, 253 (5).
2. *Custody of Child.—Rights of Parent.*—Under §3065 Burns 1914, §2518 R. S. 1881, the father, if living and a suitable person, is

**PARENT AND CHILD—Continued.**

entitled to the custody of his infant children, but if he has abandoned them or is under disability, the mother, if she is a proper person, succeeds to the right of custody; but a grandparent, who has cared for a minor child and formed a great affection for it does not thereby become entitled to its custody as against a parent, unless a strong case is made against the parent.  
*Orr v. State*, 242, 254 (7).

**PAROL EVIDENCE—**

See EVIDENCE.

**PARTIES—**

See APPEAL 16; INFANTS 5; INSURANCE 33.

Real party in interest, defense, pleading, see BILLS AND NOTES 5.

Husband as party, action for wife's services, statute, see HUSBAND AND WIFE.

**PASSENGERS—**

See CARRIERS.

**PARTNERSHIP—**

*Holding Out as Partner.—Necessity of Financial Loss.*—Where one holds himself out as a partner or knowingly permits himself to be so held out, he is liable to a creditor dealing with the firm, in the belief that such representation is true, as fully as if he were a partner in fact; and it is not necessary that the creditor suffer financial loss by reason of such holding out.

*Irvine v. Baxter Stove Co.*, 105, 108 (3).

**PAYMENT—**

Extending time, effect on previous defenses, see BILLS AND NOTES 7.

Of tender into court, necessity, see TENDER.

1. *Distinct Accounts.—Part Payments.—Application.*—Where one person is indebted to another upon several distinct accounts, he has a right to direct the application of his payments, but if the debtor pays generally the creditor may apply as he elects, and, if neither makes a specific application, the court will make such application of payments as justice between the parties most urgently demands  
*Boyd v. Greer*, 77, 83 (5).

2. *Exchange of Real and Personal Property.—Part Payments.—Application.—Vendor's Lien.*—In an action to enforce a vendor's lien for the amount of a note given by defendant for the balance of the purchase price on the sale in gross of a farm and certain personalty, the court, in the absence of direction by the parties, would be authorized to apply the value of land conveyed in part payment by defendants, first to any amount agreed on by the parties as to the value of the personal property, and the remainder, if any, on the price of the farm land, and where such an application fully discharged the debt owing for the personalty, so that the entire amount of the notes in suit constituted an unpaid balance on the purchase price of the farm, plaintiff was entitled to a decree establishing a vendor's lien in his favor.

*Boyd v. Greer*, 77, 84 (6).

3. *Vendor and Purchaser.—Vendor's Lien.—Mode and Application of Payments.*—The sale of land may take the form of an exchange when the buyer pays a part or all of the purchase price

**PAYMENT—Continued.**

in other lands, and, in the absence of fraud, such payment has the same legal effect, as regards the right of the court to determine its application, as if the agreed value of the land purchased had been paid in money. *Boyd v. Greer*, 77, 83 (4).

**PEDESTRIANS—**

Injuries, liability, see MUNICIPAL CORPORATIONS; NEGLIGENCE 5.

**PEREMPTORY INSTRUCTIONS—**

Presenting questions, see APPEAL 38, 43.

**PERSONAL INJURIES—**

Liability, see CARRIERS; MASTER AND SERVANT.

**PLEADING—**

See also SET-OFF AND COUNTERCLAIM.

Review of rulings on pleadings, see also APPEAL.

Misnaming pleading, effect, see APPEAL 101.

1. *Definition.—Scope.*—Pleadings in a cause are the formal statements by the parties of their respective claims and defenses, and in the broadest sense include all proceedings from the complaint until issue is joined.

*McMillan, Admr., v. Plymouth, etc., Power Co.*, 336, 341 (6).

2. *Determining Sufficiency.*—In determining the sufficiency of a pleading, the court will be controlled by its substance, rather than by its formal parts, or by the name given it by the pleader.

*Cleveland, etc., R. Co. v. Partlow*, 616, 622 (4).

3. *Complaint.—Construction.—Variance.*—In an action on a contractor's bond, the bond and the contract, which includes the plans and specifications, must, in considering the complaint, be construed together, and, if any allegations of the complaint vary from the provisions of the contract, the latter will control.

*Lake Mich. Water Co. v. U. S. Fidelity, etc., Co.*, 537, 541 (1).

4. *Complaint Founded on Written Instrument.—Variance.*—In an action on an accident insurance policy, where the averments of the complaint as to the terms of the policy vary from the provisions thereof, the provisions of the policy control.

*Rubens v. U. S. Casualty Co.*, 35, 37 (1).

5. *Complaint.—Allegations.—Conclusions of Law.*—In an action against the owner of a building and the general contractor in charge of its construction by an employe of a subcontractor, who was injured by the falling of a scaffold, allegations in the complaint that it was the duty of defendants to see that the material used in the construction of the scaffold was carefully selected and tested, and that the scaffolding was properly constructed, were mere conclusions of law, where no facts were stated from which the duty arose.

*Mackey v. Lafayette, etc., Trust Co.*, 59, 67 (4).

6. *Complaint.—Failure to Demur.—Waiver of Defects.—Statute.*—Under §348 Burns 1914, Acts 1911 p. 415, all objections to the sufficiency of a complaint are waived by the failure to demur thereto.

*Valdenaire v. Henry*, 68, 70 (1).

7. *Conclusions of Law.—Statute.*—The provision of §343a Burns 1914, Acts 1913 p. 850, authorizing the pleading of conclusions, subject only to a motion to make more specific, means a conclu-



## PLEADING—Continued.

- sion of fact, and 'does not warrant the pleading of a purc conclusion of law. *Central Bank, etc. v. Martin*, 387, 393 (6).
8. *Conclusion of Law*.—In an assignee's action on a note, an averment that assignor corporation had no power to assign the note states a proposition of law, since the powers of a corporation are determined by law. *Central Bank, etc. v. Martin*, 387, 393 (5).
9. *Demurrer*.—*Appeal*.—*Waiver of Defects*.—In view of §344 Burns 1914, Acts 1911 p. 415, an appellant who demurred to a complaint waives defects not specified in the memorandum filed with the demurrer. *Rembarger v. Losch*, 98, 101 (1).
10. *Demurrer*.—*Inferences*.—Upon demurrer all reasonable inferences deducible from the facts alleged may be considered in aid of the pleadings. *Webb v. Citizens Nat. Bank, etc.*, 22, 28 (1).
11. *Demurrer to Complaint*.—*Memorandum*.—*Sufficiency*.—An objection to the sufficiency of the complaint, set out in the memorandum accompanying the demurrer, "that no facts are alleged to show or showing the defendant guilty of actionable negligence," is too general and indefinite to present any question. *Pittsburgh, etc., R. Co. v. Baughn*, 333, 335 (2).
12. *Demurrer to Complaint*.—*Waiver of Objections*.—*Failure to Point Out in Memorandum*.—Under §344, cl. 6, Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, objections to the sufficiency of the complaint not stated in the memorandum accompanying the demurrer are waived. *Pittsburgh, etc., R. Co. v. Baughn*, 333, 334 (1).
13. *Demurrer to Set-Off or Counterclaim*.—*Form*.—*Sufficiency*.—A demurrer to a set-off or counterclaim for insufficient facts should be in the same form as a demurrer to a complaint, which, under §344 Burns 1914, Acts 1911 p. 415, is that the pleading does not state facts sufficient to constitute a cause of action, so that a demurrer on the ground "that said set-off does not state facts sufficient to constitute a cause of action by way of set-off," is insufficient to challenge a pleading which, though termed a set-off by the pleader, set up a cause of action as a counterclaim. *Cleveland, etc., R. Co. v. Partlow*, 616, 622 (3).
14. *Exhibits*.—*Variance*.—Where there is a variance between a pleading and exhibits filed therewith, the latter control. *Feichter v. Korn*, 205, 210 (2).
15. *Answer*.—*Sufficiency*.—If an answer is good on any theory, it is error to sustain a demurrer thereto. *Central Bank, etc. v. Martin*, 387, 393 (3).
16. *Answer*.—*Argumentative Denial*.—In an action for conversion, an answer setting up a judgment awarding defendant possession of the property involved in an action brought by him against plaintiffs amounted to an argumentative denial, the substance of it being that there was no conversion. *Sapirle v. Collins*, 529, 530 (1).
17. *Answer*.—*Indefiniteness*.—"Pretended" Corporation.—In an action on a note assigned by a casualty insurance company, a reference in a paragraph of answer to the assignor as a "pretended" corporation cannot, in the absence of the facts being pleaded, have any weight as against an averment that such company purports to have been organized under the statute. *Central Bank, etc. v. Martin*, 387, 393 (4).
18. *Answer*.—*Grounds of Demurrer*.—In a subcontractor's action to foreclose a mechanic's lien for the installation of certain parts

**PLEADING—Continued.**

of a stoker, an answer is not demurrable on the ground that it proceeds both upon the theory of a counterclaim and an answer, if the pleading contains averments sufficient under either theory.

*Coonse, etc., Ice Co. v. Home Stove Co.*, 226, 231 (2).

19. *Motion to Strike Out.—Office of.*—If a pleading is a proper one to be filed and is timely filed, a motion to strike out should not be sustained, and, if such pleading is insufficient, it should be demurred to, so that the pleader may have an opportunity to correct the fault thereof.

*Reserve Loan Life Ins. Co. v. Sumner*, 472, 477 (1).

**PRAECIPE—**

See APPEAL 31; EXCEPTIONS, BILL OF 2.

**PRESUMPTIONS—**

See APPEAL; EVIDENCE.

**PRINCIPAL AND AGENT—**

See INSURANCE.

Authority of agent sufficiency of evidence, see INJUNCTION 1.

**PRINCIPAL AND SURETY—**

See also BILLS AND NOTES.

Assignment of future payment under building contract, release of surety, see SCHOOLS AND SCHOOL DISTRICTS.

1. *Creation of Relation.—Contract.—Breach.—Liability.*—A contract entered into by defendants, in consideration of one dollar paid by plaintiff, and the execution of an agreement by plaintiff company with a vendor of its goods to furnish such vendor merchandise for resale, and to extend the time of payment of an existing indebtedness, to guarantee payment of such sum and of the price of goods to be furnished thereafter, was a contract of suretyship, and not a guaranty, and defendants were liable without notice of vendor's default.

*Hess v. J. R. Watkins Medical Co.*, 416, 422 (2).

2. *Surety.—Guarantor.—Distinction.*—A surety undertakes to do that which his principal is bound to do, in event the principal fails to comply with his contract, while a guarantor undertakes that the principal will do the things stipulated in the contract by the principal to be done, and, in event the principal fails to perform, that he, the guarantor, will pay whatever damages may be sustained by the beneficiary by reason of such failure of the principal.

*Hess v. J. R. Watkins Medical Co.*, 416, 420 (1).

**PROMISSORY NOTES—**

See BILLS AND NOTES.

**PROXIMATE CAUSE—**

Act of God, intervention of human agency, effect, see NEGLIGENCE 7.

Definition, see NEGLIGENCE 9.

Injuries to passengers, negligence, see CARRIERS 9, 16.

Sufficiency of evidence, see RAILROADS 3.

**PUBLIC IMPROVEMENTS—**

See HIGHWAYS; MUNICIPAL CORPORATIONS 10; TOWNS.

**PUBLIC NUISANCE—**

See NUISANCE.

**QUANTUM MERUIT—**

See CONTRACTS 5.

**QUIETING TITLE—**

Defenses, proof under general denial, see APPEAL 105.

**RAILROADS—**

See also CARRIERS; STREET RAILROADS.

1. *Crossing Accidents.—Action.—Evidence.*—In an action against a railroad for injuries sustained in a crossing accident, evidence that the engines of defendant railroad and those belonging to another railroad using the same track had both the names of a railroad system and the initials of the railroad to which they belonged painted on them, was admissible under an allegation that such railroads were being operated under the system named on defendant's engines.

*Michigan Central R. Co. v. Kosmowski*, 145, 156 (11).

2. *Crossing Accidents.—Action.—Instructions.—Ignoring Issues.*—In an action against a railroad for injuries to person and property sustained in a crossing accident, requested instructions omitting the element of injury to plaintiff and limited to the damage to property were properly refused.

*Michigan Central R. Co. v. Kosmowski*, 145, 155 (6).

3. *Crossing Accidents.—Complaint.—Sufficiency.—Proximate Cause.*—In an action against a railroad company for injuries sustained by a wagon driver in a crossing accident, complaint containing allegation that plaintiff was injured by reason of defendant's negligence in running its train in violation of a speed ordinance and in failing to sound whistle or bell, *held* sufficient as against the objection that defendant's negligence is not shown to be the proximate cause of the injury.

*Michigan Central R. Co. v. Kosmowski*, 145, 153 (3).

4. *Crossing Accidents.—Complaint.—Sufficiency.—Contributory Negligence.*—In an action against a railroad for injuries sustained by the driver of a wagon in a crossing accident, complaint containing general averment of freedom from fault on the part of plaintiff, *held* sufficient against the objection that it showed plaintiff to have been guilty of contributory negligence.

*Michigan Central R. Co. v. Kosmowski*, 145, 153 (2).

5. *Crossing Accidents.—Contributory Negligence.—Instructions.*—In an action against a railroad for injuries to person and property sustained in a railroad crossing accident, an instruction relating principally to the subject of damage to property, but telling the jury that plaintiff was required to prove that the damage occurred without any fault or negligence on his part, was correctly refused as being misleading, the instruction not being limited to a recovery for personal property.

*Michigan Central R. Co. v. Kosmowski*, 145, 155 (9).

6. *Crossing Accidents.—Contributory Negligence.*—Where the driver of a team and wagon approached a railroad crossing at the speed of three miles an hour, but, though looking carefully, was unable, because of the numerous headlights, switchlights, etc., to discover a train approaching at a speed of seventy miles an hour until his horses were about to enter on the track, when he at-

**RAILROADS—Continued.**

tempted to stop the horses and back them out of danger, but failed because they suddenly lunged forward and across the track, he was not, as a matter of law, negligent.

*Michigan Central R. Co. v. Kosmowski*, 145, 154 (4).

7. *Crossing Accidents.—Contributory Negligence.—Burden of Proof.*—In an action against a railroad for personal injuries sustained in a crossing accident, plaintiff did not have the burden of showing want of due care on the part of defendant.

*Michigan Central R. Co. v. Kosmowski*, 145, 155 (7).

8. *Crossing Accidents.—Negligence.—Violation of Speed Ordinance.—Instructions.*—In an action against a railroad for injuries sustained in a crossing accident, an instruction that the operation of a train at a rate of speed forbidden by city ordinance was "ordinarily" negligence was properly refused, since the violation of an ordinance is negligence *per se*.

*Michigan Central R. Co. v. Kosmowski*, 145, 155 (8).

9. *Injuries to Persons on Tracks.—Liability.—Last Clear Chance.*—Where railroad employes in charge of a train discover the presence of a person on the tracks and his ignorance of his danger and peril in time to protect him by exercising ordinary care, it is their duty to do so under the last clear chance doctrine, regardless of whether he is a licensee or trespasser, and failing so to protect him the railroad company is liable.

*Ferguson, Adm'r., v. Cleveland, etc., R. Co.*, 543, 549 (3).

10. *Injuries to Persons on Tracks.—Paragraphs of Complaint.—Theories.*—In an action against a railroad company for the death of one killed while walking along defendant's tracks, held that the theory of two paragraphs of complaint was the same.

*Ferguson, Adm'r., v. Cleveland, etc., R. Co.*, 543, 548 (1).

11. *Obstructing Stream.—Liability.—Unexpected Flood.—Instruction.*—In an action against a railroad for negligently and unlawfully obstructing the flood waters of a stream, an instruction that plaintiff could not recover if the flood was "unexpected" was erroneous, where the word "unexpected" was used without being in any manner qualified.

*Zollman v. Baltimore, etc., R. Co.*, 395, 412 (19).

12. *Obstruction of Stream.—Liability.—Instruction.—Unusual and Extraordinary Flood.*—In an action against a railroad for unlawfully obstructing the flood waters of a river, an instruction that plaintiff could not recover, if the damage was caused by a flood which was unusual and extraordinary, was erroneous, since, by reason of the comprehensiveness and flexibility in meaning of the terms "extraordinary" and "unusual," the use of such words unqualified and unexplained outlined a defense broader than the law recognizes. *Zollman v. Baltimore, etc., R. Co.*, 395, 410 (13).

13. *Obstruction of Stream.—Liability.—Instruction.*—In an action against a railroad for negligently and illegally obstructing the flood waters of a stream, an instruction "that defendant is not liable for the act of God, and by acts of God is meant not only natural accidents such as lightning, earthquakes and tempests," but also all other unavoidable and inevitable accidents, was both erroneous and harmful, where under the facts of the case defendant might be liable for the damages caused by the waters of a flood, the language used in the instruction being such as to lead the jury to misunderstand that floods were included in the term "act of God." *Zollman v. Baltimore, etc., R. Co.*, 395, 414 (22).

**RAILROADS—Continued.**

14. *Obstruction of Stream.—Liability.—Instruction.*—In an action against a railroad for negligent and illegal obstruction of the flood waters of a stream, an instruction that, if plaintiff's damages were caused in some other way than by obstructions which defendant placed in the natural channel of the river, or that by the manner in which it erected its trestles on its right of way, plaintiff could not recover, *held* erroneous as being somewhat obscure when considered in the light of the complaint and evidence and too narrow when measured by the allegations and proof.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 413 (21).
15. *Obstruction of Stream.—Unprecedented Flood.—Liability.*—The mere fact that a flood is unprecedented cannot be said, as a matter of law, to form the basis of an escape from liability by one negligently and unlawfully obstructing a stream.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 411 (15).
- 16.—*Obstruction of Stream.—Unusual and Extraordinary Flood.—Liability.*—In an action against a railroad for negligently and unlawfully obstructing the flood waters of a river, although the flood that concurred with defendant's acts was unusual and extraordinary in nature, defendant is liable if the concurrence of the flood might have been anticipated by the exercise of reasonable skill and foresight.  
*Zollman v. Baltimore, etc., R. Co.*, 395, 410 (14).

**RATIFICATION—**

Void and voidable contracts, see **CONTRACTS** 6, 7.

**REAL ESTATE—**

Damages to land lying in two counties, see **VENUE**.  
Exchange, false representations, damages, see **FRAUD**.  
Exchange, commission, statute, see **BROKERS**.  
Sale, contract, see **FRAUDS**, **STATUTE OF**.  
Vendor's lien, value, proof, see **EVIDENCE** 9.

**REASONABLE TIME—**

Tender of premiums by insurer, see **INSURANCE** 16.

**RECEIVERS—**

*Title of Receiver.—Conditional Sales.—Bona Fide Purchaser.*—Under the law of Illinois that a conditional contract of sale of personalty is void as to *bona fide* purchasers and execution creditors of a vendee in possession of a chattel, the receiver of insolvent corporation buyer, its stockholders, or the creditors represented by the receiver, are not *bona fide* purchasers.  
*Chalmers & Williams v. Surprise, Rec.*, 646, 656 (5).

**RECORDS—**

Certificate of acknowledgment, sufficiency, see **ACKNOWLEDGMENT**.  
On appeal, preparation and contents, see **APPEAL** 18-41.

**REMEDIES—**

Election, by bringing action, see **ELECTION OF REMEDIES**.

**REPRESENTATIONS—**

False, in application, effect, see **INSURANCE** 20.  
Fraudulent, exchange of land, damages, see **FRAUD**.

**RES ADJUDICATA—**

Claims, allowance, see **BANKRUPTCY 1.**

**RESCISSION—**

Contract of employment, disobedience, dismissal, see **MASTER AND SERVANT 3.**

**REVIEW—**

See **APPEAL.**

**RISKS—**

Assumption, applicability, see **CARRIERS 12.**

**RULE IN SHELLEY'S CASE—**

See **WILLS 14, 18.**

**RULES OF COURT—**

Compliance, briefs, presenting questions, see **APPEAL 45-62.**

**SALES—**

*Contract.—Construction.—Law Controlling.—Presumption.—Parol Evidence.—Amendment to Pleading.*—Where a contract for the sale of certain machinery by an Illinois manufacturer to an Indiana company f. o. b. Chicago provided that the contract should be deemed consummated in that city, but did not provide to whom or to what destination the machinery was to be shipped, a presumption arose that the contract was to be governed by the laws of Illinois, but such presumption was rebuttable by any evidence which did not contradict or vary the terms of the contract; hence, where the seller intervened in the buyer's receivership proceeding for the purpose of recovering the machinery, and subsequently filed its motion to amend its original petition so as to lay a proper foundation for the introduction of evidence to show the intention of the parties as to what law was to govern the contract it was error for the trial court to deny the motion.  
*Chalmers & Williams v. Surprise, Rec., 646, 653, 654 (1).*

2. *Validity.—Conditional Sales.—Buyer's Insolvency.—Rights of General Creditors.—Execution Creditor.—Creditor.—Judgment Creditor.*—Under the law of Illinois that conditional sale contracts are void as to execution creditors of a vendee in possession of a chattel, the general creditors of an insolvent corporation are not execution creditors on the theory that the seizure by the receiver of machinery sold to the corporation under a conditional sale contract was in the nature of an equitable levy by the court, and fixed a lien thereon in favor of the general creditors; a creditor being one who has a legal right to damages or a debt capable of enforcement by judicial process, a judgment creditor being one whose claim has been merged into a judgment against his debtor, and an execution creditor being one who, having obtained a judgment, has caused execution to be issued thereon.  
*Chalmers & Williams v. Surprise, Rec., 646, 655, 656 (3).*

**SCHOOLS AND SCHOOL DISTRICTS—**

1. *Erection of School House.—Payment of Materials.—Assignment by Contractor.—Release of Surety.*—Where a contractor for the construction of a school building, in alleged violation of his contract with the surety, assigned a future payment under the building contract to pay the claim of a materialman, and the surety, with knowledge of such assignment, took over and com-

**SCHOOLS AND SCHOOL DISTRICTS—Continued.**

pleted the contract on the contractor's failure, the surety was estopped from claiming that such assignment released it, the surety's conduct under the circumstances constituting a ratification of the assignment. *U. S. Fidelity, etc., Co. v. Elliott*, 130.

2. *Property.—Grant for School Purposes.—Abandonment of Use.—Effect.*—Where land was granted to the trustee of a school township on condition that it should revert to the grantors whenever it ceased to be used for school purposes, the grantor is entitled to retake the property, where it ceased to be used for the purpose set forth in the grant, regardless of the fact that the township trustee, acting under §6422 Burns 1914, Acts 1907 p. 444, which was enacted after the grant, abandoned the school because the average daily attendance was twelve pupils or less, as the conditions embraced in the conveyance could not be affected by subsequent legislation. *Carter v. School Township, etc.*, 604.

**SERVANTS—**

See MASTER AND SERVANT.

**SET-OFF AND COUNTERCLAIM—**

See also APPEAL 101, 106.

Demurrer to, form, sufficiency, see PLEADING 13.

*Counterclaim.—Right to Plead.—Action for Demurrage.*—In view of §353 Burns 1914, §348 R. S. 1881, defining a set-off, and §355 Burns 1914, §350 R. S. 1881, declaring a counterclaim to be any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce plaintiff's claim, and §356 Burns 1914, §351 R. S. 1881, providing that if any defendant omit to set up a counterclaim arising out of the contract or transaction involved, he cannot afterwards maintain an action therefor, except at his own costs, a claim for damages by the consignee of coal cars for failure of a railroad company to transport them at the speed required by §5205 Burns 1914, Acts 1907 p. 434, though termed a set-off by the pleader, was in fact a counterclaim which could properly be set up by the consignee in an action against him by the company for demurrage charges, where the cars named in such claim were among those on which demurrage was claimed, so that the respective claims of the parties arose out of the same transaction.

*Cleveland, etc., R. Co. v. Partlow*, 616, 619 (2).

**SIDEWALKS—**

See MUNICIPAL CORPORATIONS.

**STATUTES—**

Cited and construed, see p. xxii.

1. *Construction.—Common-Law Meaning.*—Where words of a definite significance under the common law are used in a statute, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning. *State, ex rel. v. Fretberg*, 1, 4 (4).
2. *Construction.—Words.—Meaning.—Common Law.*—In the construction of statutes, the court will look to the meaning attached to the words and terms used therein by the common law, and they will be deemed to be employed in their known and defined common-law meaning. *Elmore v. Brinneman*, 222, 224 (1).

**STOCK—**

Subscriptions, failure to collect, liability of directors of insolvent company, see CORPORATIONS.

**STREAMS—**

Obstruction, liability, see RAILROADS 11-16; WATERS AND WATER-COURSES.

**STREET RAILROADS—**

*Crossing Accidents.—Duty to Look and Listen.*—The duty to look and listen is not applied with strictness to those passing over car tracks laid in the streets of cities.

*Chicago, etc., R. Co. v. Wesolowski, Admr., 5, 9 (4).*

**STREETS—**

See MUNICIPAL CORPORATIONS.

**SUBCONTRACTORS—**

Liens of, right to, defenses, see MECHANICS' LIENS 2, 3.

Payment of, statute, see TOWNS.

**SUBROGATION—**

Right of insurance company paying judgment, complaint, sufficiency, see INSURANCE 8.

**SUPPORT—**

Means of, death of mother, right of children to damages, see INTOXICATING LIQUORS 2.

**SURETIES—**

See PRINCIPAL AND SURETY.

**SURPRISE—**

Setting aside default, see JUDGMENT.

**TENDER—**

1. *Sufficiency.—Refusal.—Payment into Court.—Necessity.*—In an action to enjoin payee bank from enforcing any lien against bonds deposited as collateral to secure the payment of a promissory note, the tender of the amount due on the note must be kept good by paying such amount into court.

*Webb v. Citizens Nat. Bank, etc., 22, 30 (3).*

2. *Sufficiency.—Written Offer to Pay.*—Where chattel mortgagors wrote to mortgagee demanding a return of the mortgaged property, and in the letter stated, "With this demand we offer to pay" the amount of the debt, with interest, such offer cannot be construed as a tender.

*Sapirie v. Collins, 529, 537 (4).*

**TESTATORS—**

See WILLS.

**TEXT BOOKS—**

Cited, see p. xxv.

**THEORY—**

Effect on appeal, see APPEAL 73.



**TICKETS—**

Defective, rights of passengers, see **CARRIERS 5.**

**TIME—**

Computation, statute, see **CHATTEL MORTGAGES 3.**

**TORNADO INSURANCE—**

See **INSURANCE 34-37.**

**TORTS—**

Of health officer, liability, see **OFFICERS 2.**

**TOWNS—**

See also **MUNICIPAL CORPORATIONS.**

1. *Public Improvements.—Payment of Laborers and Materialmen.—Statute.*—Section 5901a Burns 1914, Acts 1911 p. 437, providing that public officers and boards contracting for public improvements shall withhold full payment to the contractor until he has paid subcontractors or laborers employed in the work, and requiring such claims to be filed within thirty days after the completion of the work, is for the protection of laborers, materialmen and subcontractors and not of contractors and their bondsmen, and confers no right of action on any one unless the public officer wrongfully fails to withhold money due the contractor which should have been applied to claims previously filed in accordance with the statute. *State, ex rel. v. Puckett, Trustee*, 591, 595 (1).

2. *Trustees.—Action on Bond.—Complaint.—Sufficiency.*—In an action by a surety on the bond of a public contractor against a township trustee and his bondsmen to recover for an alleged wrongful payment by the trustee to a public contractor before the claims of materialmen and subcontractors had been paid, a complaint failing to allege the filing of claims of subcontractors and materialmen prior to the time of payment to such contractor is insufficient to show a violation of §§5901a, 5901b Burns 1914, Acts 1911 p. 437, it being presumed that the trustee performed his statutory duties and therefore that no claims had been filed pursuant to such statutes.

*State, ex rel. v. Puckett, Trustee*, 591, 596 (2).

**TRACKS—**

See **RAILROADS.**

**TRANSCRIPTS—**

See **APPEAL 18-41; EXCEPTIONS, BILL OF.**

Authentication, sufficiency, see **EVIDENCE.**

**TRESPASS—**

Damages to land lying in two counties, statute, see **VENUE.**

**TRIAL.**

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| I. RECEPTION OF EVIDENCE, 1.                 | V. VERDICT—GENERAL AND SPECIAL, 21-31.     |
| II. CONDUCT OF COUNSEL, 2.                   | VI. TRIAL BY COURT—CONCLUSIONS OF LAW, 32. |
| III. TAKING CASE OR QUESTION FROM JURY, 8-9. | VII. WAIVER OF RIGHTS, 33.                 |
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Review of rulings at trial, see also **APPEAL.**

**TRIAL—Continued.****I. RECEPTION OF EVIDENCE.**

Review of rulings on evidence, *see* **APPEAL**.

1. *Competent for Specific Purpose.—Limiting Application.*—Since evidence competent for some purpose will not be excluded because the jury may erroneously use it for another purpose, it is the duty of a party desiring to guard against such possibility to tender an instruction limiting its application to the particular purpose.  
*Irvine v. Baxter Stove Co.*, 105, 111 (6).

**II. CONDUCT OF COUNSEL.**

2. *Improper Argument.*—Where appellee's counsel made statements outside of the evidence in his closing argument to the jury, but the record shows that the alleged objectionable statement was made in response to remarks equally as objectionable made by appellant's counsel, such misconduct is not reversible error.  
*Deep Vein Coal Co. v. Ward, Adms.*, 161, 166 (5).

**III. TAKING CASE OR QUESTION FROM JURY.**

3. *Directing Verdict.*—Refusal of a requested instruction directing a verdict for defendant is proper, where there is some evidence to sustain every element essential to plaintiff's right to recovery.  
*Vandalla R. Co. v. Fry*, 85, 88 (1).
4. *Directing Verdict.*—In an action against a railroad for injuries sustained in a crossing accident, instructions directing a verdict for defendant were properly refused where it was clearly established that the train at the time of the accident was running at a much greater speed than allowed by municipal ordinance, and where, under the evidence, the question of plaintiff's negligence and proximate cause was for the jury.  
*Michigan Central R. Co. v. Kosmowski*, 145, 154 (5).
5. *Directing Verdict.—Evidence.—Duty of Court.*—In an action for wrongful death, if the evidence on any issue is insufficient in law to sustain a verdict in favor of plaintiff, it is the duty of the court to direct a verdict upon such issue against him.  
*Caldwell v. Alley*, 313, 319 (2).
6. *Directing Verdict.—Evidence.*—If there is a conflict in the evidence on any material point, or, if the evidence adduced, there being no conflict therein, is not sufficient legally to support a verdict, it is error for the court to direct a verdict for plaintiff.  
*Krabbe v. City of Lafayette*, 423, 431 (4).
7. *Directing Verdict.—Evidence.*—If defendant introduces evidence which, either directly or by fair inference, tends to sustain any defense within the issues, it is error for the trial court to direct a verdict for plaintiff.  
*Millett v. Aetna Trust, etc., Co.*, 451, 455 (4).
8. *Directing Verdict.—Evidence.*—Where there is uncontradicted evidence which clearly makes out a case for plaintiff, and no evidence which tends to establish a defense, it is proper for the court to instruct the jury to return a verdict in its favor.  
*Millett v. Aetna Trust, etc., Co.*, 451, 454 (3).
9. *Directing Verdict.—Failure to Object.*—The objection that the court erred in directing a verdict for plaintiff before defendant had introduced all of his evidence and rested his case was waived, where defendant, although excepting to the action of the court in giving the instruction, did not inform the court that he had not concluded his evidence, or sought to have the instruction

**TRIAL—Continued.**

withheld in order that he might complete his evidence, and took no other action to avoid the alleged error.

*Millett v. Aetna Trust, etc., Co.*, 451, 453 (1).

**IV. INSTRUCTIONS.**

Review of, see also **APPEAL**.

10. *Cure of Omissions*.—In an action for personal injuries, the giving of an instruction failing to inform the jury as to certain facts bearing on plaintiff's contributory negligence was not error, where the jury was fully instructed on that issue by other instructions given.

*Vandalia R. Co. v. Fry*, 85, 88 (3).

11. *Incomplete*.—*Duty to Request Proper Instructions*.—In an action for personal injuries, an instruction that it was not necessary for plaintiff to prove any immaterial allegations of the complaint, although incomplete, is not reversible error, it being defendant's duty in such case to present and request an instruction correctly stating the issues.

*Deep Vein Coal Co. v. Ward, Adms.*, 161, 164 (2).

12. *Invading Province of Jury*.—*Reversal*.—On a servant's action for personal injuries brought under the Employers' Liability Act (Acts 1911 p. 145, §8020a *et seq.* Burns 1914), an instruction that plaintiff's statement, "it was all my fault," made shortly after the accident, was only a conclusion not amounting to an admission of negligence, was erroneous as invading the province of the jury, and such error warrants a reversal where the court on appeal cannot say that a correct result was reached at the trial.

*Warner Gear Co. v. DePeugh*, 284, 286 (3).

13. *Predicating on Erroneous Instruction*.—An instruction predicated on other instructions previously given by the specific reference "as hereinbefore set forth," is bad, if any of such other instructions are erroneous.

*McBeth-Evans Glass Co. v. Brunson*, 513, 527 (8).

14. *Refusal*.—*Repetition*.—Where, on a number of issues in the case, defendant tendered several instructions which were so nearly alike that the giving of all of those requested on any one subject might have resulted in a repetition harmful to plaintiff, but as to each issue the court gave at least one of the instructions tendered thereon, defendant was not prejudiced by the refusal of the remainder of the requested instructions.

*Scottish, etc., Ins. Co. v. B. E. Linkenhelt & Co.*, 324, 330 (6).

15. *Refusal*.—*Review*.—It was not error for the court to refuse requested instructions which, in so far as correct, were substantially covered by instructions given by the court on its own motion.

*Vandalia R. Co. v. Fry*, 85, 88 (2).

16. *Refusal*.—*Review*.—The refusal of requested instructions, even though they state the law correctly, is not error, where they were covered by others given by the court.

*Deep Vein Coal Co. v. Ward, Adms.*, 151, 166 (4).

17. *Refusal*.—*Review*.—It is not reversible error to refuse requested instructions which, in so far as they properly state the law, are covered by other instructions given.

*Indianapolis, etc., Traction Co. v. Helms, Adms.*, 137, 144 (6).

18. *Refusal*.—*Review*.—It is not error to refuse requested instructions which are fully covered by others given.

*Kingan & Co. v. Albin, Adms.*, 488, 509 (12).

## TRIAL—Continued.

19. *Refusal.—Review.—Inapplicability to Evidence.*—In an action for wrongful death due to unguarded machinery, a requested instruction that the owner of dangerous machinery was under no obligation to guard it while repairs were being made, although correct as an abstract proposition of law, was properly refused, where there was no evidence to which it was applicable.

*Kingan & Co. v. Albin, Adms., 493, 509 (13).*

20. *Applicability to Evidence.*—In a passenger's action against an interurban railroad for threatened ejectment unless she paid a cash fare, the conductor having declined to accept a defective ticket, an instruction that, if the passenger had done what was necessary under the carrier's rules to entitle her to transportation, the carrier was liable for her threatened expulsion, by reason of the conductor's mistake or want of judgment, although he, under the circumstances, acted in good faith, was not objectionable as being inapplicable to the evidence, even though it showed that plaintiff had not complied with defendant's rules in boarding the car from which ejectment was threatened, where there was evidence to warrant a finding that such failure to comply with the company's rules was induced by defendant's negligence.

*Union Traction Co. v. Smith, 40, 47 (7).*

## V. VERDICT—GENERAL AND SPECIAL.

Review of, see also APPEAL.

21. *Effect.*—A general verdict for plaintiff finds in his favor every issuable fact essential to his recovery.

*Washburn-Crosby Co. v. Cook, 463, 467 (2).*

22. *Effect.*—A general verdict for plaintiff finds every material allegation of the complaint against the defendant.

*Indianapolis, etc., Traction Co. v. Hardwick, Adms., 192, 198 (3).*

23. *Answers to Interrogatories.*—To sustain the general verdict as against the jury's answers to special interrogatories, courts consider all the material facts provable under the issues.

*Washburn-Crosby Co. v. Cook, 463, 467 (4).*

24. *Answers to Interrogatories.*—The answers to special interrogatories must be in irreconcilable conflict with the general verdict to authorize a judgment thereon.

*Washburn-Crosby Co. v. Cook, 463, 467 (1).*

25. *Interrogatories without General Verdict.—Effect.—Statute.*—In view of §572 Burns 1914, Acts 1897 p. 128, providing that, in jury trials the jury shall render a general verdict, but when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact, answers to interrogatories, in an action against several defendants, were without force as to two of defendants, where there was no general verdict as to them, and the judgment in their favor was a nullity.

*Bruce v. Hubbell, 237, 241 (3).*

26. *Interrogatories.—Refusal to Submit.—When Harmless.*—A party submitting proper interrogatories has the right to have them answered fairly and fully, but it is not available error for the court to refuse to require the jury to retire and make more definite answers, where the answers demanded would not, if given, change the result of the judgment rendered.

*Kingan & Co. v. Albin, Adms., 493, 506 (8).*

27. *Interrogatories.—Answers Not Sustained by Sufficient Evidence.—Remedy.*—If the jury's answers to interrogatories are

**TRIAL—Continued.**

not sustained by sufficient evidence, the remedy is by motion for new trial, and not by motion to require the jury to make further answers. *Kingan & Co. v. Albin, Adm.*, 493, 507 (9).

28. *Interrogatories.—Duty of Jury.—Failure to Agree.—Discharge.*—When there is any evidence on the subject embraced in an interrogatory, it is the duty of the jury to make answer thereto in accordance with the preponderance of the evidence, but in the absence of evidence on the subject-matter of an interrogatory, the jury has the right to answer, "No evidence," and, if the jury is unable to agree upon the answers to interrogatories, the court should discharge it on account of such disagreement, the same as where the jury fails to agree on a general verdict.

*Kingan & Co. v. Albin, Adm.*, 493, 506 (7).

29. *Venire De Novo.—Scope.*—A *venire de novo*, if granted, must be as to the whole case. *Bruce v. Hubbell*, 237, 242 (4).

30. *Venire De Novo.—General Verdict.—Failure to Find on All Issues.*—In an action by a landlord against a former tenant, where two paragraphs of complaint sought to recover damages for failure to restore the property to the condition it was in when the lease was executed, and the remaining paragraphs were for damages for holding over after the expiration of the lease, and the jury returned a verdict, "We, the jury, find for the plaintiff upon the first paragraph of complaint and assess his damages at \$1.00," plaintiff's motion for a *venire de novo* should have been sustained, since the verdict was general and the jury failed to find upon all the issues. *Brehm v. Hennings*, 625, 637 (4).

31. *Venire De Novo.—Motion.—Time for Filing.*—In an action against several defendants, plaintiff's motion for a *venire de novo* was in time, though filed after judgment was rendered against one defendant, where plaintiffs were seeking relief from judgment in favor of the other defendants only, the motion being filed before rendition of such judgment, which was the final judgment in the case. *Bruce v. Hubbell*, 237, 241 (2).

**VI. TRIAL BY COURT—CONCLUSIONS OF LAW.**

32. *Exceptions.—Effect.*—By excepting to the conclusions of law appellant concedes, for the purposes of the exception, that the facts within the issues are fully and correctly found.

*Federal Life Ins. Co. v. Maxam*, 266, 277 (1).

**VII. WAIVER OF RIGHTS.**

Waiver of objections on appeal, see **APPEAL**.

33. *Failure to Assert Rights.*—Where a party is in court in person or by counsel, and he fails to assert his legal right when an opportunity is afforded at the proper time to do so, such right is waived. *Mullett v. Aetna Trust, etc., Co.*, 451, 454 (2).

**TRUSTEES—**

School, interference with assumption of office, right to injunctive relief, see **OFFICERS**.

Action on bond, presumption as to performance of duties, see **TOWNS 2**.

**VARIANCE—**

See **PLEADING 3, 4, 14**.

**VENDOR AND PURCHASER—**

Conditional sales, see **APPEAL 78, 79.**

Vendor's lien, value, parol proof, admissibility, see **EVIDENCE 9.**

1. *Exchange of Land and Chattels in Gross.—Right to Vendor's Lien.*—Where land and chattels are sold or exchanged in gross, but the parties in making such sale or exchange have placed separate values on each, the court will enforce a vendor's lien against the land for the balance due thereon, although the obligation taken may include the price of both.

*Boyd v. Greer, 77, 82 (3).*

2. *Offer and Acceptance.*—A memorandum covering a sale of land providing that, "if this deal is made, it must be not later than October 1, 1916," constituted merely an offer to sell, and not a final agreement the specific performance of which could be enforced, without showing an acceptance of the offer within the time given.

*Feichter v. Korn, 205, 210 (3).*

3. *Remedies of Vendor.—Lien.—Waiver.—Taking Note.*—Acceptance of a vendee's notes for the unpaid portion of the purchase price of land did not deprive the vendor of his right to a vendor's lien.

*Boyd v. Greer, 77, 85 (7).*

4. *Vendor's Lien.—Waiver.—Acceptance of Mortgage.*—Generally, where the vendor of land takes a mortgage to secure the unpaid purchase price, he thereby waives the implied equitable lien which he would otherwise have as security for its payment.

*Cassidy v. Ward, 550, 557 (5).*

**VENDOR'S LIEN—**

See **PAYMENT 2, 3.**

**VENIRE DE NOVO—**

See **APPEAL 56; NEW TRIAL 5.**

**VENUE—**

Change, authentication of pleadings, questions presented, see **APPEAL 27.**

*Actions.—Right of.—Damage to Land From Trespass Committed in Another County.—Statutes.*—Under §1438 Burns 1914, §1318 R. S. 1881, providing that when the subject-matter of any suit shall be situate in two or more counties, the court which shall first take cognizance thereof shall retain the same, and §309 Burns 1914, §307 R. S. 1881, providing that actions for the determination in any form of rights or interest in real property and for injuries thereto must be commenced in the county in which the subject of the action, or some part thereof, is situated, where plaintiff's lands located in one county were flooded by reason of the erection of a dam in another county across the outlet of a lake, the circuit court of the county in which the land was situated had jurisdiction of an action to abate the nuisance and damages.

*Overmyer v. Barnett, 569, 576 (1).*

**VERDICT—**

See **TRIAL 21-31.**

Review, see **APPEAL 84-95.**

Directing, see **TRIAL 3-9.**

**WAIVER—**

- Of questions on appeal, see **APPEAL** 107-113; at trial, see **TRIAL** 33
- Of vendor's lien, see **VENDOR AND PURCHASER** 3, 4.
- Of defense, see **CONTRACTS** 8.
- Of conditions in policy by agent, see **INSURANCE** 10-12.
- Of statute, by applicant for compensation, see **MASTER AND SERVANT** 30.

**WARRANTY—**

- Application for insurance, answers of insured, construction, see **INSURANCE** 13.
- Breach, false answers in application, see **INSURANCE** 18, 21.

**WATERS AND WATERCOURSES—**

1. *Natural Watercourse.—Obstructing.—Liability.*—Waters in the low-water channel, waters heaped about them, and waters that overspread the high-water channel, are, when flowing down stream in one uniform and continuous current, where unobstructed by the act of man, the waters of a natural watercourse, and liability for obstructing the flow thereof must be determined from a consideration of the law governing the obstruction of a stream rather than that governing in the case of mere surface water. *Zollman v. Baltimore, etc., R. Co.*, 395, 407 (12).
2. *Obstructing Drain.—Level of Lake.—Statute.*—In an action for damages to land where it appeared that defendants erected a dam which obstructed the flow of water from a lake through a public drain constructed by the state thirty or forty years before the commencement of the action, and because of such obstruction plaintiff's land became flooded, defendants cannot justify the obstruction on the ground that the dam restored the lake to the level existing prior to the building of the drain, so that the removal of the dam would be in violation of §6163 Burns 1914, Acts 1905 p. 447, providing for the maintenance of lakes at their level, since the statute refers to the maintenance of the lake at its level after the construction of the drain, such improvement being made pursuant to law. *Overmyer v. Barnett*, 569, 580 (2).
3. *Obstructing Stream.—Care Required.*—One obstructing a stream is required to take notice of the effect of improvement such as the clearing of lands of forests and constructing artificial drainage. *Zollman v. Baltimore, etc., R. Co.*, 395, 412 (18).
4. *Obstruction of Streams.—Care Required.*—Due care on the part of one obstructing a stream requires that he take notice of the character of the country and that, in view thereof, he provide ample accommodation for the free passage of water at all seasons of the year. *Zollman v. Baltimore, etc., R. Co.*, 395, 412 (17).
5. *Obstruction of Stream.—Liability.*—Where injury resulting from a flood is to some extent the result of the wrongful or negligent participation of man, the consequences are regarded as exclusively of human origin so far as concerns the question of liability, and the situation is removed from the scope of the rules that govern in case of the acts of God. *Zollman v. Baltimore, etc., R. Co.*, 395, 415 (24).
6. *Obstruction of Stream.—Liability.—"Act of God."*—In its relation to resulting damages a flood is classed as an act of God in a legal sense, with the consequent immunity of man from liability,

**WATERS AND WATERCOURSES—Continued.**

only in the absence of human agency wrongfully or negligently contributing to produce the injury of which complaint is made.

*Zollman v. Baltimore, etc., R. Co.*, 395, 415 (23).

7. *Unprecedented Flood*.—A flood is unprecedented if it is somewhat higher or more destructive than any preceding flood.

*Zollman v. Baltimore, etc., R. Co.*, 395, 411 (16).

**WIFE—**

See **HUSBAND AND WIFE**.

**WILLS—**

1. *Conditions*.—"Restraint of Marriage."—*Statute*.—*Limitation of Estate*.—Where testator devised all his property to his wife "to remain her absolute property as long as she remains my widow," but in event she "should remarry, all my property shall go to my children," is not a condition in "restraint of marriage" within the terms of §3123 Burns 1914, §2567 R. S. 1881, providing that a devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void, the words used amounting only to a limitation of the estate devised.

*Thompson v. Patten*, 490, 491 (3).

2. *Conditions*.—*Restraint of Marriage*.—*Vesting of Estate Devised*.—Where a particular estate has been devised to a wife upon condition that she shall not remarry, the condition is void, and the estate vests and is held as if it had not been coupled with the condition.

*Thompson v. Patten*, 490, 491 (1).

3. *Construction*.—*Devise on Condition*.—*Intent of Testator*.—The rule that a condition annexed to a devise in fee respecting devisee's death without children or issue ordinarily refers to the period terminating with the death of the testator is one of construction only, and yields readily to the intent of the testator.

*Nickerson v. Hoover, Admr.*, 343, 355 (10).

4. *Construction*.—*Devise of Land*.—*Creation of Life Estate*.—*Condition Precedent*.—Where testator's will devised thirty acres of land to his daughter "forever provided she have heirs, if not then at her death" providing a remainder over, the will created a life estate in the daughter capable, on the condition that she have children, of being enlarged into a fee, such condition being precedent rather than subsequent, as a condition precedent is an event, the happening or not happening of which causes a conditional estate to vest or be enlarged.

*Nickerson v. Hoover, Admr.*, 343, 353, 356 (9).

5. *Construction*.—*Estate Devised*.—*Devise with Power to Sell*.—A devise of real estate to a testator's son, "to have and to hold forever with the power to sell the same and invest the proceeds in such other property, real or personal, as he may deem best," subject to the life estate of testator's widow, creates a fee, regardless of a repugnant devise over to testator's grandchildren after the son's death.

*Ewart v. Ewart*, 167, 171 (3).

6. *Construction*.—*Devise*.—*Fee Simple*.—*Devise Over*.—*Vesting*.—Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of the death of such primary devisee without children or issue, the condition refers to a death without children or issue within the lifetime of the testator, and, if the primary devisee survives the testator he takes at the latter's death an estate in fee simple.

*Nickerson v. Hoover, Admr.*, 343, 352 (7).



**WILLS—Continued.**

7. *Construction.—Devise in General Terms.—Estate Created.*—Where a devise is in general terms, unaccompanied by words of inheritance or other language defining or indicating the quantity of estate to be taken by the devisee, only a life estate is thereby created.  
*Nickerson v. Hoover, Admr., 343, 353 (8).*
8. *Construction.—Estates Created.—Use of Words.—“Heirs.”*—Superadded words in a will which merely describe or specify the incidents of the estate created by such a word of limitation as “heirs” do not cut down the interest of the devisee.  
*McOllen v. Sehker, 435, 440 (4).*
9. *Construction.—Heirs.*—The word “heir,” as used in an item of a will stipulating that testator’s daughter have thirty acres of land “provided she have heirs, if not, then at her death I wish,” her husband “to hold the same until his death if he survives her,” etc., *held* to have been used in the sense of “children,” in view of the fact that, wherever testator used the word “heirs” elsewhere in the will, he used it with the force and significance of children, and that, when the will was drawn, and at the time of testator’s death, the daughter had a number of heirs, using the term as referring to persons capable of inheriting from her at her decease.  
*Nickerson v. Hoover, Admr., 343, 350 (6).*
10. *Construction.—“Heirs.”*—Although the word “heirs,” as used in a will, may mean children, such meaning cannot be ascribed to it unless it very clearly appears that the word was used in that sense.  
*McOllen v. Sehker, 435, 439 (3).*
11. *Construction.—Heirs.—Adopted Child.—“Have.”*—Where an item of a will stipulated that testator’s daughter “have thirty acres of ground \* \* \* forever provided she have heirs,” the term “heirs” being used in the sense of children, *held* that, viewing the entire will in the light of surrounding circumstances, testator, by the phrase “provided she have heirs,” meant provided children should be born to her, and the condition was not satisfied by the daughter’s adoption of a child pursuant to §868 *et seq.* Burns 1914, §823 *et seq.* R. S. 1881, the word “have,” as used in the provision that the daughter should have thirty acres meaning to possess or to acquire, and, as used in the proviso, meaning to bear.  
*Nickerson v. Hoover, Admr., 343, 357 (12).*
12. *Construction.—Intention.*—In construing a will, the primary purpose of the court is to determine, if possible, the intention of the testator as expressed therein, and to give effect thereto.  
*Ewart v. Ewart, 167, 170 (1).*
13. *Construction.—Intention.—Consideration as a Whole.*—In determining the testator’s intention, isolated statements or separate clauses and provisions of a will should not be considered alone, but the whole will should be taken together, and each part construed with relation to the language used in other parts and effect given to the general intention thereby ascertained.  
*Ewart v. Ewart, 167, 170 (2).*
14. *Construction.—Rule in Shelley’s Case.*—Where land was devised to testator’s son “to be held by him during his natural life only, then to his legal heirs,” with a further provision that the son should not dispose of it, but at his death it should belong to his legal heirs during their life, the son took a fee under the rule in Shelley’s case.  
*McOllen v. Sehker, 435, 444 (6).*
15. *Construction.—Testator’s Intention.*—In construing a will, the court should ascertain and carry out the testator’s intention whenever it can be done without overthrowing a well-established

**WILLS—Continued.**

principle of law, but even a clear legal intention of the testator cannot be permitted to contravene the settled rules of law by depriving an estate of any of its essential legal attributes.

*McCullen v. Sekker*, 435, 441 (5).

16. *Construction.—Technical Terms.—Testator's Meaning.*—Where, by a proceeding within the rules that govern in such cases, the meaning that testator assigned to the term "heirs," as used by him in an item of his will, has been clearly ascertained, effect must be given to it as so used, even though such meaning is different from its legal or technical meaning.

*Nickerson v. Hoover, Admr.*, 343, 350 (3).

17. *Construction.—Use of Words.—Heirs.*—The word "heirs," as used in a will may signify those who take by its terms.

*Nickerson v. Hoover, Admr.*, 343, 350 (2).

18. *Construction.—Use of Words.—"Heirs."—Rule in Shelley's Case.*—Where a will uses the word "heirs" in its ordinary legal sense, a fee is vested in the first taker under the rule in Shelley's case.

*McCullen v. Sekker*, 434, 439 (2).

19. *Construction.—Use of Words.*—In determining the sense in which a testator uses a term in his will, other portions of the instrument may be examined.

*Nickerson v. Hoover, Admr.*, 343, 350 (4).

20. *Construction.—Use of Words.—Extrinsic Circumstances.*—In determining the sense in which a testator used a word in his will, the court will look at the circumstances under which the will was made, as the state of testator's family or his property, and the like.

*Nickerson v. Hoover, Admr.*, 343, 350 (5).

21. *Devise by Husband to Wife During Widowhood.—Validity.*—A husband may devise to his wife an estate to continue during her widowhood.

*Thompson v. Patten*, 490, 491 (2).

**WITNESSES—**

Competency, presenting for review, see **APPEAL 47**.

Refusal to require testimony, presenting for review, see **APPEAL 12**.

**WORDS AND PHRASES—**

"Child," "children," meaning, statute, see **DESCENT AND DISTRIBUTION**.

Creditor, definition, see **SALES 2**.

"Descendants," meaning, statute, see **DESCENT AND DISTRIBUTION**.

Execution creditor, definition, see **SALES 2**.

"Have," construction, see **WILLS**.

Heirs, technical meaning, see **DESCENT AND DISTRIBUTION 2; WILLS 10**.

"Heirs," construed as "children," see **WILLS 9, 11**.

Judgment creditor, definition, see **SALES 2**.

"Neglected child," meaning, statute, see **INFANTS 6**.

"Order" of court, definition, see **MOTIONS**.

Proximate cause, definition, see **NEGLIGENCE 9**.

"Usual course of employer's business," see **MASTER AND SERVANT 38**.

**WORKMEN'S COMPENSATION—**

Proceedings before Industrial Board, right and liabilities under act, etc., see **MASTER AND SERVANT 28-50**.



